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Pages 519 to 995

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Subject Digest

Action Appealable

Review Board denied appeal but on its own motion sets aside ALJ's order approving settlement agreement and stays proceeding pending final judgment appeal regarding state court's jurisdiction over settlement agreement.

—*Hanover Radio, Inc.*

BC Docket No. 80-664

AM Station, Operating Hours

Petition for reconsideration granted to an extent and otherwise denied. Section 73.99 of the Commission's Rules amended to permit Class III daytime-only stations to use higher power during post-sunset operation. Section 73.1725(d) governing disputes concerning nighttime resumption of operation by limited-time stations during hours when co-channel Class I station is not operating deleted.

—*Daytime AM B/c Stations*

BC Docket No. 82-538

Anti-Trust, Effect on Character

In first comparative renewal case in mobile radio common carrier service, Review Board affirmed ALJ's grant to incumbent licensee as the better comparative applicant on traditional comparative factors. Competitor's comparative showing was flawed by its failure to make a need showing.

—*Baker Protective Services, Inc.*

CC Docket No. 80-185

Appeal, From Initial Decision, Denied

Review Board denied appeal from ALJ's dismissal of MDS application for failure to prosecute and grant of competing application. Applicant's unexplained announcement on exhibit exchange date that it did not intend to submit a comparative case amounted to intentional default. Good cause existed for accepting competitor's transmitter site amendment.

—*Broadcast Data Corp.*

CC Docket No. 83-866

Application, Amendment of, After Designation

(See: Appeal, From Initial Decision, Denied-*Broadcast Data Corp.*)

Application, Dismissal of

Review Board denied appeal from ALJ's ruling dismissing appellant's application. Application dismissed because of the applicant's continuing failure to meet written exchange date. Board found that appellant did not assert legal error or show abuse of discretion on part of ALJ.
—Mad River B/cing Company, Inc.
MM Docket No. 83-612

Common Carrier, Access Charges Distributions

Order Granting Waiver until June 1, 1985, adopted which waives §69.604, which requires the National Exchange Carrier Association ("NECA") to bill and collect all carrier common line access charges. In addition, the order waives §69.607(a), to the extent necessary, to permit the NECA to effect settlements on a net basis.
—MTS/WATS Market Structure
CC Docket No. 78-72

Common Carrier Cost Support Data, Adequacy of

Report and Order adopted guidelines and findings for private line rate structures and volume discount practices.
—Private Line Rate/Volume Discounts
CC Docket No. 79-246

Common Carrier Costs, Allocation of

Petitions for further reconsideration considered and partially granted. Residential and single line business end user charge deferred unequal access differential increased.
—MTS/WATS Market Structure
CC Docket No. 78-72

(See also: Common Carrier, Cost Support Data, Adequacy of-*Private Line Rate/Volume Discounts*)

Common Carrier, Customer-Provided Equipment

First Report and Order adopted to accommodate one and two-line (non-system) business and residential premises wiring under Part 68, and define the demarcation point for purposes of Part 68 and other Commission decisions.
—Amendment of Part 68
CC Docket No. 81-216

Common Carrier, Definition

Notice of Proposed Rulemaking adopted to treat special activities as non-common carrier offerings.

—Tariff/Facilities Authorization

CC Docket No. 84-369

Common Carrier, Interconnection

(See: Common Carrier, Customer-Provided Equipment-*Amendment of Part 68*)

(See also: Common Carrier, Definition-*Tariff/Facilities Authorization*)

Common Carrier Interconnection, Carrier to Carrier

(See: Common Carrier Costs, Allocation of-*MTS/WATS Market Structure*)

Common Carrier, Like Services

(See: Common Carrier, Cost Support Data, Adequacy of-*Private Line Rate/Volume Discounts*)

Common Carrier, Maximum Separation Rules

(See: Common Carrier, Definition-*Tariff/Facilities Authorization*)

Common Carrier, Mobile Radio

Final rule adopted establishing objective need standards for applicants requesting one additional frequency on a paging system. To obtain an additional paging frequency an applicant must demonstrate that existing facilities have thirty minutes or more occupied air time during the bouncing busy hour.

—Public Mobile Radio Service

Docket No. 20870

Common Carrier, Rates, Charges

(See: Common Carrier, Definition-*Tariff/Facilities Authorization*)

Common Carrier Rates, Integration

(See: Common Carrier Costs, Allocation of-*MTS/WATS Market Structure*)

Common Carrier, Rate or Tariff, Unlawful

(See: Common Carrier, Cost Support Data, Adequacy of-*Private Line Rate/Volume Discounts)*

Common Carrier Rate Structure, Inquiry

(See: Common Carrier Costs, Allocation of-*MTS/WATS Market Structure*)

Common Carrier, Specialized Services

Petitions for reconsideration of MTS and WATS Market Structure with respect to compensation of operators of local exchanges for using local telephone exchange facilities to originate or terminate interstate or foreign telecommunications granted to an extent and otherwise denied.

—*MTS/WATS Market Structure*

CC Docket No. 78-72

Common Carrier, Unbundling

(See: Common Carrier, Cost Support Data, Adequacy of-*Private Line Rate/Volume Discounts*)

Competition, Common Carriers

(See: Common Carrier, Specialized Services-*MTS/WATS Market Structure*)

Competition, Common Carriers

Commission finalized rules and policies for common carrier nationwide paging service. It adopted an open access policy for local carriers desiring to originate network pages. It preempted state regulation over rates of the network operators and decided to forbear from regulating rates of both network organizers and operators. Commission also decided to use a lottery to choose the three network organizers.

—*Nationwide Paging Service*

Gen. Docket No. 80-183

Daytime Station

(See: AM Station, Operating Hours-*Daytime AM B/c Stations*)

Dismissal

(See: Appeal, From Initial Decision, Denied-*Broadcast Data Corp.*)

Domestic Public Land Mobile Radio Service

(See: Common Carrier, Mobile Radio-*Public Mobile Radio Service*)

(See also: Competition, Common Carriers-*Nationwide Paging Service*)

Failure to Prosecute
(See: Appeal, From Initial Decision, Denied-*Broadcast Data Corp.*)
(See also: Application, Dismissal of-*Mad River B/cing Company, Inc.*)

Financial Qualifications
Where applicant withdrew certification of financial qualification and offered instead belief that "God will provide him with the necessary funds," ALJ correctly dismissed his application for failure to meet Commission's financial qualification requirements. Applicant's constitutional claims were rejected as meritless.
—*Central Alabama B/cers, Inc.*
MM Docket No. 83-536

FM Station, Authorization
Review Board affirmed grant to FM applicant meriting dispositive Section 307(b) preference for proposing first local transmission service to Midvale, Utah. Loser proposed West Jordan, already served by daytime-only AM station, as community of license; its inconsistent requests for waivers of 47 CFR § 73.1125 and 73.1130 denied.
—*Public Service B/cing of West Jordan, Inc.*
BC Docket No. 82-366

Interlocutory Ruling, Appeal From
(See: Application, Dismissal of-*Mad River B/cing Company, Inc.*)

Interrogatories, Motion to Compel Answers to
Abuse of process issue denied where alleged threat or intimidation of licensee not established. Issue added to determine if principal violated policy against promoting use of illegal drugs. Discovery to develop evidence may be used. All parties are directed to answer interrogatories.
—*Phoenix Media Corp.*
MM Docket No. 84-36

Issue, Enlargement of, Denied
(See: Interrogatories, Motion to Compel Answers to-*Phoenix Media Corp.*)

Issue, Enlargement of, Granted
(See: Interrogatories, Motion to Compel Answers to-*Phoenix Media Corp.*)

Lottery
(See: Domestic Public Land Mobile Radio Service-*Nationwide Paging Service*)

Misrepresentation, Employment Practices
License renewal applications designated for hearing. Substantial and material questions regarding licensee's candor and its compliance with the Commission's EEO rule are raised where licensee already under reporting conditions fails to report accurately its license term hires and employment profiles. Data available indicates that Blacks occupied few full-time positions despite substantial presence in local labor force and many license term hires.
—*Albany Radio, Inc.*
MM Docket No. 84-415

Mobile Radio Service, Authorization
(See: Anti-Trust, Effect on Character-*Baker Protective Service, Inc.*)

Multipoint Distribution Service (MDS)
(See: Appeal, From Initial Decision, Denied-*Broadcast Data Corp.*)

Objective Need Standards
(See: Common Carrier, Mobile Radio-*Public Mobile Radio Service*)

One-Way Communications
(See: Competition, Common Carriers-*Nationwide Paging Service*)

Operation, Hours of Daytime-Only
(See: AM Station, Operating Hours-*Daytime AM B/c Stations*)

Paging Service
(See: Domestic Public Land Mobile Radio Service-*Nationwide Paging Service*)

(See also: Common Carrier, Mobile Radio-*Public Mobile Radio Service*)

Post-Sunset Operation
(See: AM Station, Operating Hours-*Daytime AM B/c Stations*)

Reciprocal Service
(See: FM Station, Authorization-*Public Service B/cing of West Jordan, Inc.*)

Reconsideration, Petitions for, Grant of
(See: Common Carrier, Specialized Services-*MTS/WATS Market Structure*)

Renewal, Applicant v. New Applicant
(See: Anti-Trust, Effect on Character-*Baker Protective Services, Inc.*)

Rules, Amendment of
(See: Common Carrier, Specialized Services-*MTS/WATS Market Structure*)

Service Need for
(See: Anti-Trust, Effect on Character-*Baker Protective Services, Inc.*)

Settlement
(See: Action Appealable-*Hanover Radio, Inc.*)

Stay
(See: Action Appealable-*Hanover Radio, Inc.*)

Suburban Community 307 (b) Issue
(See: FM Station, Authorization-*Public Service B/cing of West Jordan, Inc.*)

Summary Decision
(See: Financial Qualifications-*Central Alabama B/cers, Inc.*)

Sunset
(See: AM Station, Operating Hours-*Daytime AM B/c Stations*)

Telephone Equipment, Registration
(See: Common Carrier, Customer-Provided Equipment-*Amendment of Part 68*)

Transmission First Local
(See: FM Station, Authorization-*Public Service B/cing of West Jordan, Inc.*)

Wide Area Telephone Services (WATS)
(See: Common Carrier, Specialized Services-*MTS/WATS Market Structure*)

Misrepresentation, Employment Practices

License renewal applications designated for hearing. Substantial and material questions regarding licensee's candor and its compliance with the Commission's EEO rule are raised where licensee already under reporting conditions fails to report accurately its license term hires and employment profiles. Data available indicates that Blacks occupied few full-time positions despite substantial presence in local labor force and many license term hires.

—*Albany Radio, Inc.*

MM Docket No. 84-415

FCC 84-185

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of ALBANY RADIO, INC. For Renewal of License of Stations WALG and WKAK(FM) Albany, Georgia	MM Docket No. 84-415 File Nos. BR-811201VZ and BRH-811201D4

MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY

Adopted: April 26, 1984; Released: May 16, 1984

BY THE COMMISSION

1. The Commission has before it: (i) The above-captioned license renewal applications for Stations WALG and WKAK(FM), Albany, Georgia, filed December 1, 1981, by Albany Radio, Inc. (ARI or licensee);[1] (ii) an informal objection to the applications filed March 1, 1982, by the

[1] In addition to the stations' renewal applications, we have before us the EEO progress reports filed by the stations on September 11, 1980 and December 1, 1981. These reports were required pursuant to a Commission "By Direction" letter dated October 18, 1979.

National Black Media Coalition (NBMC);[2] (iii) an opposition thereto filed April 15, 1982, by the licensee; (iv) NBMC's reply filed June 21, 1982; (v) a letter dated June 10, 1983 from the Chief, EEO Branch, Enforcement Division, Mass Media Bureau to the licensee; and (vi) the licensee's response filed August 9, 1983. For the reasons which follow, we find an evidentiary hearing is needed to resolve substantial and material questions of fact concerning the candor[3] or gross lack of care[4] displayed by the licensee in the EEO progress reports submitted during the most recent license term. In addition, as a consequence of the foregoing, we find that a substantial and material question of fact exists with respect to the licensee's implementation of its EEO program.

2. By way of background, the stations were subject to EEO reporting conditions during the most recent license term (April 1, 1979 to April 1, 1982).[5] These conditions had been imposed to correct perceived deficiencies, namely: with a 32.3% Black available labor force the stations' 1978 EEO profile revealed an absence of Blacks on a full-time staff of eighteen, the EEO program suggested that Blacks were hired only for part-time work in low-level positions, and the program contained no proposals for increasing the stations' pool of minority job applicants for upper-level positions. Thus, throughout the most recent license term, the licensee was on notice that the stations' EEO performance would be carefully scrutinized and that it was obligated to keep accurate records to reflect reasonable, good faith efforts to attract minority job applicants for each position filled.

3. Initial review of the stations' two progress reports indicated that some steps had been taken to employ minorities in positions of responsibility. However, in responding to NBMC's challenge, the licensee conceded that minority employment at the stations was not as high as originally reported because a Black female listed as a professional was mistakenly included in the stations' profile. Further, and without any explanation whatever, the licensee provided information which showed that a greater number of hires had occurred than was reported in the stations' EEO

---

[2] Although NBMC styled its pleading a petition to deny, we have already determined that it is not a party in interest. *Renewals of Alabama and Georgia Broadcast Stations,* FCC 83-413, released September 19, 1983. Hence, NBMC's pleading is being considered as an informal objection.

[3] *See Metroplex Communications of Florida, Inc. [WHYI(FM)],* FCC 84-71, released March 9, 1984.

[4] *Cf. Northern Television, Incorporated,* FCC 83-504, released November 1, 1983.

[5] *Supra* note 1. Because of the conditions the licensee was required to submit a list of all employees as of August 1, 1980 and November 1, 1981, ranked from the highest paid to the lowest paid; a list of persons hired from the date of the "By Direction" letter to August 1, 1980 and from August 1, 1980 to November 1, 1981; and details concerning the stations' efforts to recruit for each position filled during the reporting periods.

program. Moreover, the events reported by the licensee in its opposition were not consistent with the information in the stations' 1980, 1981 and 1982 Annual Employment Reports. To develop a complete record, the licensee was asked to provide information about license term hires, recruitment efforts, terminations and promotions.[6] Essentially, the inquiry asked for the identical information that should have been provided in the progress reports pursuant to the Commission's Order.

4. Review of the licensee's response, filed August 9, 1983, discloses additional unexplained inconsistencies among the licensee's several submissions. Moreover, the licensee's latest response indicates that the number of hiring opportunities which the stations had was substantially greater than the number originally reported. Finally, although the new data suggests that the stations' minority hiring percentage is approximately equal to that originally reported, it shows that the nature of the jobs held by Blacks was not as significant as originally reported. Given that the licensee was specifically obligated to implement an aggressive EEO program and to report its efforts accurately, its apparent disregard leads us to conclude that an extension of reporting conditions is inappropriate. Indeed, as we shall explain in greater detail, we believe that the nature and extent of the licensee's apparent shortcomings mandate that its qualifications be explored in a hearing.[7]

I. *Recruitment and Job Hires*

5. The licensee's first progress report, filed September 11, 1980, reveals that the stations maintained contact with thirteen organizations or entities and with "Black individuals" in order to increase its pool of minority job applicants. The report further shows that as a consequence of these efforts, four persons, including two Blacks, were hired for full-time positions. The Black hires were for announcer positions. No hires for part-time work were reported.

6. In the licensee's second progress report, filed with the stations' renewal applications' EEO program, recruitment contacts are shown with two local organizations (no referrals), three employment services (eight referrals), and Albany State College (no referrals). However, the report shows that none of the stations' six hires, all for full-time work, were minorities. Thus, during the period covered by the licensee's reports

[6] The EEO program filed with the applications for renewal of license essentially constituted the second EEO progress report.

[7] Although our review of the stations' performance is a direct consequence of NBMC's informal objection (Section 0.283(b)(1)(iii) of the Commission's Rules), we do not believe it appropriate to make NBMC a party to the hearing. In this regard, we note that NBMC refers only to the information submitted by the licensee in the stations' EEO program and that it failed to establish party in interest status as a petitioner. *See supra* note 2.

(October 10, 1979 to November 1, 1981), there were ten new hires, two of whom were Black and all of whom were for full-time work.

7. This hiring information was different from that reflected in the licensee's opposition to NBMC's informal objection and was inconsistent with data appearing in the stations' license term employment profiles.[8] The licensee's opposition relates the hiring of fourteen (not ten) persons, including four who were hired for part-time work. One of the four part-time hires is a Black previously shown as having been hired for full-time work, and two of the persons previously listed as hires in the stations' progress reports are not named. Moreover, a comparison of this data with the stations' profiles reveals at least three additional hires, two white males hired in October 1979 to fill professional positions and a white male hired between August 1, 1980 and March 1981 to fill a technician position. Thus, the licensee's submissions reflect the hiring of at least nineteen persons during the period of the reports, not ten as originally reported, nor fourteen as named in the licensee's opposition pleading.

8. The licensee was advised of the noted discrepancies and was asked to submit a list of hires and terminations for the 1979-1982 license term. The stations' list of hires indicates that eighteen positions were filled during the period covered by the licensee's reports. However, a comparative analysis with the list of terminations indicates that five unreported white persons were hired during the same time. Further, although the licensee's new data reflects many more hires than reflected in its opposition pleading, the licensee insists that the pleading's description of its recruitment efforts is substantially complete and accurate.

9. In our view, the recruitment and hiring information ultimately reported by the licensee is substantially at odds with the information originally submitted. As noted, the stations now appear to have hired twenty-three persons during the period of the reports, not ten. Further, the licensee has offered no explanation as to why its original reports did not list all of the persons hired. Given these circumstances, we find that a hearing is necessary to determine the extent of the licensee's hiring and the reasons for its apparently inaccurate progress reports.

II. *Employment Profiles*

10. As originally submitted, the stations' employment profiles appear as follows:

[8] The profiles are derived from the stations' Annual Employment Reports and the two lists of employees submitted with the stations' progress reports.

	Overall			*Top-Four Jobs*		
	Total	*Blacks*	*Hispanics*	*Total*	*Blacks*	*Hispanics*
1982	25	1 (4.0%)	1 (4.0%)	20	0	1 (5.0%)
Ren. App.	23	3 (13.0%)	0	19	2 (10.5%)	0
1981	24	1 (4.2%)	1	18	0	0
Aug. 1980	22	3 (13.6%)	0	18	1 5.6%)	0
1980	22	2 (9.1%)	0	18	0	0
	32.3% available Black labor force					

As the data reflect, the highest percentages for Black employment coincide with the dates used for the stations' two progress reports.

11. In its opposition to NBMC's informal objection, the licensee admits that a Black female appearing in its renewal applications' profile was listed by mistake. Moreover, after it was brought to the licensee's attention that its lists of hires did not include any Hispanics, the licensee submitted a revised license renewal application profile. According to the licensee's latest data, the stations' renewal profile is as follows:

	Overall		*Top Four Jobs*	
	Total	Blacks	Total	Blacks
Ren. App.	25	2 (8.0%)	21	1 (4.8%)

Thus, the revised renewal application profile not only shows one less Black but also two more full-time employees.[9]

12. In addition to its apparently erroneous listing of an employee as a Hispanic, we note that the licensee claims that its renewal application listing of a Black female in a professional position was an inadvertent error. Given the size of the stations' workforce, the near absence of Blacks from that workforce, the fact that the employee in question had left the stations' staff in September 1980 (more than one year earlier), and considering the critical difference her inclusion makes in the initial statistical analysis of the stations' EEO program and performance, we find this explanation inadequate. Accordingly, in light of the foregoing, we believe it necessary to explore the truthfulness of the licensee's representations.

III. *EEO Implementation*

13. With regard to the implementation and effectiveness of the stations' EEO program, we note that the Albany, Georgia SMSA (now MSA) labor force includes 33.0% minorities (32.3%) Blacks. The stations' license term profiles, as gleaned from the stations' Annual Employment

[9] The revised list also includes four part-time employees; the original list shows no part-time employees.

Reports and September 11, 1980 and December 1, 1981 employment reports as corrected, reveal the following:

	Overall		*Top Four Jobs*	
	Total	*Minorities*	*Total*	*Minorities*
April 1982	25	2 (8.0%)	20	2 (5.0%)
November 1981	25	2 (8.0%)	21	1 (4.8%)
1981	24	2 (8.3%)	18	0
August 1980	22	3 (13.6%)	18	1 (5.6%)
1980	22	2 (9.1%)	18	0
50% and 50% of SMSA parity		16.5%		16.5%

None of these figures are within our processing guidelines.[10] During the license term (April 1, 1979 to April 1, 1982), the stations' most recent lists of job hires and terminations show that at least thirty-one persons were hired, including six (19.4%) Blacks, and that twenty-six persons were hired for positions in the upper-four job categories, including five (19.2%) Blacks, all for professional positions. However, with respect to full-time positions, only two of seventeen (11.8%) jobs overall were filled by Blacks and only one of thirteen (7.7%) full-time upper-level jobs was filled by a Black. Further, the issues raised by the inaccuracies in the licensee's renewal applications raise questions about its overall EEO efforts. Accordingly, we believe the hearing should also include an examination of the stations' compliance with our EEO rule, and we shall therefore specify an EEO issue.

14. Accordingly, IT IS ORDERED, that the petition to deny filed by the National Black Media Coalition IS DISMISSED and when considered as an informal objection IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

15. IT IS FURTHER ORDERED, that pursuant to Section 309(e) of the Communications Act of 1934, as amended, the license renewal applications for Stations WALG and WKAK(FM) ARE DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order upon the following issues:

(1) To determine whether the licensee of Stations WALG and WKAK(FM) made misrepresentations of fact or was lacking in candor or violated Sections 1.65 or 73.3514 of the Commission's Rules with regard to the stations' 1982 renewal applications' EEO program and documents submitted in support thereof;

[10] Labor force figures for Albany were obtained from the Georgia Department of Labor's "Labor Resource Information for Affirmative Action Programs (1981)."

(2) To determine whether the licensee of Stations WALG and WKAK(FM) violated Section 73.2080 of the Commission's Rules with regard to its employment of Blacks;

(3) To determine whether, in light of the evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience, and necessity.

16. IT IS FURTHER ORDERED, that if it is determined that the hearing record does not warrant an Order denying the captioned applications, it shall also be determined whether the applicant has willfully or repeatedly violated Sections 1.65 (keeping a pending application accurate), 73.2080 (EEO), and 73.3514 (filing accurate information in an application) of the Commission's Rules.

17. IT IS FURTHER ORDERED, that this document constitutes a Notice of Apparent Liability for forfeiture for violation of Sections 1.65, 73.2080, and 73.3514 of the Commission's Rules. In so doing, we have determined that in every case designated for hearing involving revocation or denial of assignment, transfer or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, we now will, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

18. IT IS FURTHER ORDERED, that in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence upon issues (1) and (2) and the burden of proof with respect to all issues shall be upon the applicant, Albany Radio, Inc.

19. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein, pursuant to Section 1.221 of the Commission's Rules, in person or by attorney, shall file with the Commission, within twenty (20) days of the mailing of this Order, a written appearance in triplicate, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, that Albany Radio, Inc. shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in that rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

21. IT IS FURTHER ORDERED, that the licensee may transfer freely its other broadcast station licenses, unless and until it is otherwise directed.

22. IT IS FURTHER ORDERED, that the Secretary send by Certified Mail—Return Receipt Requested—one copy of this Order to the applicant and to the National Black Media Coalition.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Customer-Provided Equipment
Common Carrier, Interconnection
Telephone Equipment, Registration of

First Report and Order adopted to accommodate one and two-line (non-system) business and residential premises wiring under Part 68, and define the demarcation point for purposes of Part 68 and other Commission decisions.
—*Amendment of Part 68*
CC Docket No. 81-216

FCC 84-182

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matters of	
Petitions Seeking Amendment of	CC Docket No. 81-216
Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network	RM-2845 RM-2930 RM-3195 RM-3206 RM-3227 RM-3283 RM-3316
and	RM-3329
Notice of Inquiry into Standards for Inclusion of One and Two-Line Business and Residential Premises Wiring and Party Line Service in Part 68 of the Commission's Rules	RM-3348 RM-3501 RM-3526 RM-3530 RM-4054

FIRST REPORT AND ORDER

Adopted: April 26, 1984; Released: May 18, 1984

I. *INTRODUCTION*

1. This *First Report and Order* adopts final rules pursuant to a *Second Notice of Proposed Rulemaking and Order* in CC Docket No.

81–216 (Second Notice), 92 FCC 2d 1 (1982), which requested final comment on proposed changes in Part 68 of the Commission's rules. The Commission's Part 68 program provides the technical and procedural standards under which telephone equipment, systems and apparatus (in the aggregate "premises equipment" or "CPE") may be directly connected to the nationwide network. Under current Part 68 rules, subscribers may install multi-line wiring[1] under the supervision of a properly authorized person or a professional engineer licensed in the jurisdiction where the wiring is installed.[2] The Second Notice proposed to expand Part 68 to permit the installation of business and residential one and two-line (non-system) customer-owned premises wiring (COPW).[3]

2. The Second Notice followed a *Notice of Proposed Rulemaking and Notice of Inquiry* in CC Docket No. 81–216, 85 FCC 2d 868 (1981) (First Notice), which requested, in its NOI portion, public comment on (1) whether Part 68 should be structured to accommodate one and two-line non-system wiring, and, if so, what kinds of institutional controls should be utilized, and (2) alternative vehicles for including party line service under Part 68.[4] Based on the comments received in response to the First Notice, the Second Notice proposed the inclusion of non-system wiring in

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[1] Multi-line wiring refers to telephone wiring associated with private branch exchange (PBX) and key telephone systems, *i.e.*, system wiring. It involves three or more central office lines.

[2] *See* 47 C.F.R. § 68.215(c); Interstate and Foreign Message Toll Telephone Service (Third Report and Order), 67 FCC 2d 1255 (1978); Interstate and Foreign Message Toll Telephone Service (Memorandum Opinion and Order), 70 FCC 2d 1800 (1979).

[3] For purposes of discussion, we will refer to *all* premises wiring which is owned by the customer as COPW. COPW will then be classified as either system (multi-line) wiring or non-system (one and two-line) wiring. AT&T suggests in its comments that "CPW" (customer premises wiring) is a better term than "COPW" since the rules adopted in this proceeding are to apply equally to all customer premises wiring regardless of ownership. AT&T Comments at 2 n.*. To the contrary, however, the rules adopted here are to apply only to wiring *owned* by the customer. That is, customers who choose to augment existing non-system wiring or install entirely new non-system wiring will be able to do so under the rules set forth herein. One and two-line inside wiring is not deregulated, and thus remains subject to tariff if provided by the telephone company. As noted in the *Second Notice*, 92 FCC 2d at 31-32, this order does not preclude telephone companies from providing one and two-line premises wiring on a tariffed basis nor does it provide telephone subscribers with a right to purchase embedded one and two-line wiring. Thus, we believe that COPW is a more accurate description of the wiring at issue in this proceeding than is CPW. The deregulation of one and two-line premises wiring is being considered in Deregulation of Customer Premises Inside Wiring (Further Notice of Inquiry), CC Docket No. 79–105, 86 FCC 2d 885 (1981), and in proceedings at the state level. The Commission has recently detariffed new system wiring installed as part of a detariffed CPE system in Modifications to the Uniform System of Accounts, CC Docket No. 82–691, FCC 83–457 (released November 2, 1983).

[4] The NPRM portion of that proceeding sought public comment on a number of rulemaking petitions. Because the NOI portion dealt with issues linked to other proceedings and

Part 68, and suggested various standards to assure that non-system COPW does not cause harm to the network. The Second Notice also proposed a definition of the "demarcation point" at which telephone company facilities end and COPW begins. Finally, the Second Notice included our decision not to expand Part 68 to encompass party line service.[5]

3. Comments were filed by sixteen parties, representing telephone carriers, users and manufacturers.[6] All parties agree that one and two-line non-system wiring should be included in our Part 68 program and there is substantial agreement as to many of the specific proposals set forth in the Second Notice. In the discussion that follows, we will consider each such proposal as well as other suggestions offered by the commenting parties, in roughly the order discussed in the Second Notice.

II. *DEMARCATION POINT*

A. *Definition*

4. As a preliminary matter, we invited parties to comment on our proposed definition of demarcation point – the exact point where telephone company facilities (and, thus telephone company responsibility)

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required expeditious resolution, the Second Notice focused on those issues only. 92 FCC 2d at 2. The matters raised in the NPRM portion will be considered in forthcoming orders.

[5] USITA, however, arguing that the Second Notice made no reference to COPW for party lines, but only to terminal equipment for party lines, urges that the rules for non-system wiring permit party line subscribers to install their own premises wiring. USITA Comments at 7-8. GTE agrees. GTE Reply at 22-23. These proposals will be rejected. The same reasons which led us to conclude that CPE for party lines should not be included in Part 68 apply equally to COPW for party lines. *See* 92 FCC 2d at 37. Moreover, because COPW is now encompassed by Part 68, and Part 68 does not apply to party line service, the rules we adopt herein cannot be applicable to party line COPW. As indicated in the Second Notice, we will leave matters involving party line service to local telephone companies and state regulatory commissions. 92 FCC 2d at 39-40.

[6] Comments were filed by the Bell Operating Companies and the American Telephone and Telegraph Company (AT&T), Association of American Railroads (AAR), People of the State of California and the Public Utilities Commission of California (California), Colorado Communications Services, Inc. (CCS), Federal Executive Agencies (FEA), GTE Service Corporation (GTE), Independent Data Communications Manufacturers Association (IDCMA), Insulated Cable Engineers Association, Inc. (ICEA), National Burglar and Fire Alarm Association (NBFAA), New York State Department of Public Service (New York), North American Telephone Association (NATA), Pennsylvania Burglar and Fire Alarm Association (PBFAA), Rural Electrification Administration (REA), County of Riverside, California, Department of Communications (Riverside), United States Independent Telephone Association (USITA), United Telephone System, Inc. (UTS), and Utilities Telecommunications Council (UTC). AT&T, California, FEA, GTE, IDCMA, NATA, and Northern Telecom, Inc. filed reply comments. (Subsequent to the filing of their comments, the Bell System Operating Companies were divested from AT&T.) In addition, we received numerous letters from various burglar and fire alarm associations and alarm companies.

ends and COPW begins. We observed in the Second Notice that there likely is no single definition which would encompass the practices of all telephone companies in the country. We recognized that some definition is needed, however, to provide a legal point of demarcation between the network and COPW so that the Commission's initiatives in *Computer II*[7] and CC Docket Nos. 79-105 and 82-861, *supra* note 3, concerning the deregulation of inside wiring, may proceed in an orderly fashion. 92 FCC 2d at 8.

5. Our proposed definition was based on the fact that all telephone companies utilize protectors as a means to safeguard a subscriber's premises and the telephone network from atmospheric or other electrical discharges that may strike or be induced in outside telephone wire. The protector's usual location is at or near the point of entry of the telephone cable into the subscriber's premises, although specific location varies with local telephone company practices, building type and environmental factors. Relying on existing protector location practices, we designed a definition that was flexible enough to encompass all building types, including multi-unit premises, and all types of wiring, including multi-line wiring associated with PBXs and key systems. 92 FCC 2d at 9. In sum, we proposed to revise Section 68.3(h) to read as follows:

> (h) *Interface or Demarcation Point*: The point of interconnection between telephone company communications facilities and equipment, protective apparatus or wiring at a subscriber's premises. The interface or demarcation point shall be located at the subscriber's side of telephone company's protector, or the equivalent thereof in cases where a protector is not employed, as provided under the local telephone company's (reasonable and nondiscriminatory) standard operating practices.[8]

We noted that the responsibility for proper grounding of the protector itself would remain with the telephone company, unless the subscriber rendered the grounding ineffective by his or her own faulty installation of wiring. *Id.*[9]

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[7] Second Computer Inquiry, 77 FCC 2d 384 (1980), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

[8] To add clarity, UTS and GTE suggest that we include a definition of "premises" in Section 68.3. UTS Comments at 3-4; GTE Reply at 23. We believe this unnecessary in view of the definition of demarcation point we adopt herein. We note that in the interstate telephone tariffs, the term "premises" denotes a building or buildings on continuous property [except railroad rights of way, etc.] not separated by a public thoroughfare. *See* AT&T Communications Tariff FCC No. 263, Section 2.5.

[9] This definition presumes that the telephone company will provide only wire and associated installation devices on its side of the demarcation point within the customer's premises.

6. With the exception of NBFAA and PBFAA,[10] all commenting parties support locating the demarcation point on the subscriber's side of the telephone company's protector. Several parties, however, suggest clarifications and refinements to our proposed definition. New York, for example, notes that because demarcation point location is dependent upon the unique physical characteristics of each building, there may be some difficulty with our definition, which fixes the location at the subscriber's side of the protector. New York adds that this is particularly apparent in multi-unit buildings where the protector may be located in an equipment room but house riser and floor distribution cables[11] sometimes extend the telephone company's facilities to the subscriber's premises. To make clear that the demarcation point should be located somewhere "*on* the subscriber's side of the telephone company's protector or equivalent thereof," New York suggests substituting the word "on" for "at" in the second sentence of the proposed definition. New York Comments at 3-5. AT&T concurs with this suggestion. AT&T Reply at 3 n.***.

7. Although we do not believe that the definition, as proposed, requires that the demarcation point be located virtually contiguous to the protector, we believe that changing the word "at" to "on" would serve to make this more clear. The word "at" may carry an implication that the demarcation point must be located in close proximity to the protector or at the protector itself, whereas "on" appears to connote better the flexibility to locate the demarcation point somewhere on the subscriber's side of the protector. To avoid possible confusion that the demarcation point must be located adjacent to the protector, although we suggest that in most cases involving new wiring this indeed would be the case, we will adopt New York's proposal.

8. GTE and UTS recommend that the word "network" be added in front of "interface" so that the caption would read "Network Interface or Demarcation Point." The parties reason that there are many interfaces at a subscriber's premises, such as a CPE to COPW interface and an equipment-to-equipment interface, and the suggested modification would help to distinguish the COPW-telephone network interface from others. GTE Comments at 4; UTS Comments at 3. AT&T states that it does not oppose this modification. AT&T Reply at 5.

9. It is not clear that other interfaces could be confused with the one intended by the rule. We believe the term "network" is implicit in our proposed definition of "interface." We are amenable to the commenters' proposal, however, since it may, as the parties claim, more accurately

[10] The positions of NBFAA and PBFAA are discussed and rejected at paras. 15-18 *infra*.

[11] House risers are the vertical cables which run from the outside plant terminal up through various floors of the building; floor distribution cables are horizontal cables which run from the distribution box or closet on each floor to the individual units.

identify the relevant "interface" as the point at which COPW and telephone company communications facilities interconnect. Accordingly, we will adopt this suggestion.

B. *Multi-Unit Buildings*

10. As recognized in the Second Notice, multi-unit buildings present peculiar definitional difficulties because the protector may be located in an equipment room, or each unit may be separately served, either from a common point or independently, depending on the characteristics of the structure itself. 92 FCC 2d at 9. Based on our belief that the most practical and flexible solution to the problem of defining the demarcation point is to develop a uniform definition broad enough to encompass all building types — including multi-unit buildings — we proposed the definition set forth in the Second Notice. Several parties express concern that this definition may not deal adequately with the unique situations faced in multi-unit buildings.

11. UTS, for example, asserts that by allowing the demarcation point in multi-unit buildings to be located either near the protector or at each unit, the possibility exists that a subscriber in a multi-unit building may be unable to obtain tariffed telephone company service if the building owner fails to provide premises wiring. To ensure subscribers of access to tariffed telephone company-provided service, UTS suggests that the definition of demarcation point include a provision requiring the telephone company to offer network service to those requesting it on a resonable and non-discriminatory basis in multi-unit buildings. UTS Comments at 2-3. IDCMA, apparently under the assumption that the demarcation point must be located adjacent to the protector, also asserts that our proposed definition may isolate the subscriber from the telephone network. Arguing that it is not appropriate to assign to the subscriber the responsibility for the inside wiring between his or her premises and the protector or to permit the carrier to terminate its service somewhere short of the subscriber's premises, IDCMA urges that we should define the demarcation point for multi-unit buildings *inside* each unit, at a point specified by the subscriber. IDCMA Comments at 4. NATA asserts that in multi-unit buildings there is plant on the subscriber side of the protector which should be recognized as part of the regulated telephone network. NATA reasons that the demarcation point should therefore be at the point where the telephone line enters each premises, rather than at the protector, unless the building owner chooses otherwise. NATA Comments at 14-15. California, for its part, argues that residents should not have ready access to the interior wiring which serves other residents, and therefore that the demarcation point for multi-unit buildings should be inside the premises of each unit. California Comments at 3.

12. AT&T and GTE assert, on the other hand, that our proposed definition is appropriate for all building types. AT&T Comments at 6; GTE Comments at 3. GTE suggests that the telephone company should be allowed flexibility in determining the location of the demarcation point anywhere between the protector and a standard jack in a multi-unit building. GTE Reply at 10. GTE also suggests that we expressly affirm our intent not to allow third party ownership of risers and house cable to limit access to the network. GTE Reply at 14. In addition, AAR supports our definition as proposed. AAR Comments at 2.

13. Initially, we note that our definition is flexible enough to allow the demarcation point to be located near the common building protector or inside each individual unit, in accordance with the local telephone company's standard operating procedures. Thus, commenters' fears that subscribers will be isolated from the network, based upon the assumption that telephone company facilities must end at the protector, are unfounded. The concern of UTS and California in urging a demarcation point inside each individual unit also appears unwarranted. UTS reasons that it is inappropriate to assign the responsibility for house risers and cable which are outside the control of the subscribers to those subscribers, while California asserts that residents should not have access to interior wiring which serves other residents. Both these concerns seem to rest on the assumption that if the demarcation point is located near the common building protector, rather than in each unit, the responsibility for and access to house risers and cable will generally be with individual tenants. To the contrary, this responsibility and access will generally rest with the building owner, who will own the risers and distribution cables. Further, we see no greater likelihood of illicit access to others' lines where the demarcation points are located together in, for example, a building basement. In most buildings today, subscriber telephone lines are located on cross-connect panels in telephone-company controlled cabinets in building basements. Access to these cross-connect panels or common demarcation points will be limited to the telephone company and the building owner, who owns the cable.

14. We recognize, however, that in multi-unit buildings in which riser cable and loop distribution facilities are under the control of the building owner, troublesome issues involving the terms and conditions of telephone network access may develop. For example, a tenant (or condominium owner) might encounter excessive delay when seeking installation or relocation of a jack, or might require circuit conditioning not possible with existing building and riser distribution cables. As an independent entity not subject to regulatory scrutiny, a building owner generally is not under a legal duty to respond to such tenant requests. This matter may be exacerbated upon tenancy or building ownership succession, where

successors or assignees could be burdened with unforeseen restrictions on their use of cables and distribution facilities. Our overriding concern is to permit multi-unit building tenants direct access to the full range of wireline communications services generally available. We believe that in some situations local or, where appropriate, federal regulatory oversight could be invoked to ensure that tenants are offered direct access to the telephone network at a demarcation point located in their own premises (as opposed to a demarcation point near the common protector). In this regard, we note that the rules and policies we set forth here do not prohibit state regulatory agencies from establishing terms and conditions by which local telephone companies may or must install riser and distribution facilities to serve tenants directly in multi-unit buildings.[12]

15. In conclusion, we see no reason at this time to mandate that the demarcation point be located only inside each unit of multi-unit buildings. We will not preclude the multi-unit building owner and the telephone company from agreeing to locate the demarcation point for all building units at a common location near the protector, nor will we foreclose tenants from receiving service via landlord controlled cable.[13] And, as indicated, should problems arise in multi-unit buildings in which riser cable and floor distribution facilities are under the landlord's control, local or federal regulatory oversight may be invoked. We reserve the right to revisit these matters, however, upon a showing that telephone service to subscribers in multi-unit buildings is restricted or impaired by our decisions herein.

C. *Access to the Protector*

16. Our demarcation point proposal provides that wiring and grounding at the protector are the telephone company's responsibility, unless a COPW installer renders the grounding ineffective by faulty wiring installation. 92 FCC 2d at 9-10. This is consistent with our regulatory intent to bifurcate responsibility at a demarcation point located on the subscriber's side of the protector and to prevent damage to the protector

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[12] The state's broad power to impose appropriate restrictions upon an owner's use of property was recognized by the United States Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), where the Court upheld that portion of a New York statute which required a landlord to permit a cable television franchisee to install cable facilities on the landlord's property. The Court held, however, that the physical occupation of the building by the cable facilities constituted a taking for which the landlord was entitled to just compensation under the fifth and fourteenth amendments of the United States Constitution

[13] As for NATA's proposal that demarcation point location should be left to the building owner in multi-unit situations, we believe that it is sufficient to leave coordination of demarcation point location to the parties involved in accord with the "reasonable and non-discriminatory" operating practices of local telephone companies. *See* paras. 22-25 *infra*.

and potential network harm. With the exception of NBFAA and PBFAA, no party takes issue with this assignment of responsibility. Indeed, California, which had earlier advocated a demarcation point at the protector, comments that:

> [I]f the protector is the demarcation point ... customer[s] ... might engage in wiring activity or testing which results in the making or breaking of hardwire connections at the protector. If customers are permitted such access, the utility cannot be responsible for the integrity of the protector and its associated grounding. [California Comments at 2].

GTE, AT&T and UTS also support assigning to telephone companies the exclusive responsibility for protectors and grounding. GTE, in fact, urges us to modify our proposed rules to state expressly this proposition. GTE Comments at 5-6; UTS Comments at 4; AT&T Reply at 7.

17. NBFAA, a nationwide association of alarm companies, takes issue with this. The transmission of most security alarm systems to central monitoring systems is through the telephone line. These alarm systems are connected to the network by an alarm jack, such as the RJ31X jack presently used, which is installed between the protector and the first telephone terminal. The alarm equipment will preempt use of the telephone line and, depending on the alarm system, will allow a pre-programmed number to be dialed and/or will set off a local alarm. NBFAA asserts that because of "the failure and the inability of the utilities to install [alarm] jacks in a timely manner" and "the consistent inability of telephone company installers to properly install alarm jacks," the subscriber or installer should be permitted to wire alarm jacks directly onto the protector.[14] Thus, NBFAA contends that the protector itself should be the demarcation point. NBFAA Comments at 3. It further argues that the utilities' proposal to allow subscribers to connect their own alarm jacks provided that there is an intervening telephone company-installed demarcation jack will not solve the aforementioned problems. NBFAA observes that alarm companies will still be dependent upon the utility to first visit the premises to install a standard demarcation jack, which, according to NBFAA, is an "overusage of equipment" creating greater potential for mistakes in installation. Moreover, NBFAA notes an alarm system is easier to disconnect and disable when connected through a plug and jack arrangement than when the alarm jack is connected directly to the protector. NBFAA Comments at 6-7. NBFAA submits that there is no hazard if a customer connects an alarm jack directly to the protector, that "at worst, the customer may disable his own telephone." NBFAA Comments at 7. The Pennsylvania Burglar and Fire Alarm

[14] This proposal directly relates to the issue of whether telephone-company installed standard jacks should be required at the demarcation point. We will limit our discussion here to the specific question of whether the demarcation point should be the protector itself. The demarcation jack requirement will be discussed below.

Association (PBFAA) supports NBFAA's position and adds that another reason for permitting alarm companies to install RJ31X jacks directly to the protector is that telephone companies charge customers "excessive and unwarranted" rates for such installation. PBFAA Comments at 2, 3. California Reply at 2-3; GTE Reply at 5-9.

18. Both GTE and California respond that hardwiring alarm jacks to the protector is unjustified and could interfere with the operation of the protector. GTE disagrees with NBFAA's analysis of potential harm, stating that unauthorized access to the protector has, in fact, resulted in damage to the protector block and accidental interruption of service to other customers. GTE Reply at 8. California suggests that NBFAA's physical security concerns are best met by protecting an *indoor* modular interface device from tampering; GTE notes that it is just as easy to disable an alarm system by cutting a hardwired connection as it is to unplug a plug/jack connection.

19. We believe that much of NBFAA and PBFAA's concerns can be resolved without creating the risk of damage to the premises protector. Although we recognize that some burglar alarm company personnel may be qualified to hardwire alarm jacks directly to the protector, we do not believe that a broad authorization for all alarm company personnel to do so is warranted here. Contrary to NBFAA's allegations, the risks of damage extend beyond a particular subscriber's service to potential harm to others. Our proposal, advanced in the Second Notice and adopted below, would allow alarm companies to install their own alarm jacks to a plug adapter that is interposed between the demarcation point jack provided by the telephone company and the subscriber's plug and associated wiring.[15] This would eliminate the concern that alarm jacks may not be properly installed or installed at unreasonable rates by telephone companies. We are unconvinced that a plug and jack arrangement sufficiently increases the likelihood that the alarm system will be disabled or that it increases the potential for mistakes in installation so as to justify customer access to the protector. Nor do we believe that the undocumented allegations of delay created by requiring the telephone company to install the demarcation jack warrants disturbing the proposed delineation of responsibility. In the interest of preventing potential network harm, we agree with GTE's position, which tracks our proposal, that the demarcation point protector should remain solely the telephone company's responsibility. Accordingly, this concept will be included in Section 68.213(b) of the rules:

> Responsibility for the protector (and its associated grounding) on the network side of the demarcation point rests with the telephone company, though the subscriber is responsible for consequences resulting from erroneous wiring procedures conducted

[15] RJ31X jacks are included as authorized connectors in Subpart F of Part 68 and thus may serve as the demarcation jack if installed by the telephone company.

under his or her direction. Responsibility for wiring on the subscriber's side of the demarcation point (including any protector that may be installed as part of the premises wiring) purchased in-place or wholly or partially new, rests with the owner (or subsequent owner) of the wiring.[16]

Having established the responsibilities of the parties, we see no reason why telephone companies could not respond quickly to reasonable requests for service. If burglar alarm companies or subscribers experience what they believe are unreasonable delays, they may bring these to our attention by way of a complaint.

D. *Protectors Required for Aerial COPW*

20. In the Second Notice we stated that although responsibility for the demarcation point protector would remain with the telephone company, responsibility for any additional protectors which might be installed as part of the subscriber's premises wiring would rest with the subscriber. 92 FCC 2d at 9-10. The intent was to define the demarcation point as the end of telephone company responsibility. GTE urges, however, that we extend the telephone company's responsibility to any protectors required for one and two-line aerial COPW between buildings or structures on a single tract of property, whether or not separated by a public way.[17] GTE argues that the safety concerns which warrant assigning responsibility for entrance protectors and grounding to the telephone company apply equally to other protectors which may be required for non-system COPW. GTE Comments at 5. AT&T supports this proposal. AT&T Reply at 7.

21. GTE's proposal conflicts with our intent to bifurcate responsibility at the demarcation point. Regardless of whether protectors for aerial wiring have been properly installed, the telephone company's protector on the network side of the demarcation point is designed to protect the network from certain hazardous voltages emanating from the subscriber's premises, such as high voltage lightening generated pulses on interbuilding wiring. Thus, we will reject GTE's proposal. Nevertheless, we believe it advisable to ensure that subscribers are aware that there are potential dangers attendant upon installation of aerial protectors and wiring. Therefore, we will add the following to the list of guidelines

[16] We recognize that in situations involving "special environmental conditions," such as are present with power substations, the protector may be owned by a telephone company subscriber, *i.e.*, the energy utility, rather than by the telephone company itself. *See* UTC Comments at 3. UTC recommends that in such situations the demarcation point be located at a point mutually agreed upon by the energy utility and the telephone company. *Id.* We believe that UTC's concern is already accommodated by our rule, which relies on the parties involved to coordinate demarcation point identification in accordance with local practices. *See* paras. 22-25 *infra*.

[17] GTE would not impose this requirement when system wiring is involved, reasoning that such wiring is installed by trained installers who are aware of the need for and routinely provide protectors on the subscriber's side of the demarcation point.

contained in the FCC publication for simple installations of one and two-line COPW:[18]

> Aerial wiring between buildings or structures on a single tract of property not separated by a public way may, by local regulation, require the installation of protectors and associated grounding. Improper installation of protectors or inadequate protectors may lead to potentially hazardous voltages entering a subscriber's premises. Local electrical code or National Electrical Code (in the absence of an applicable local code) provisions should be referred to before installing such wiring.

E. *Coordinating Demarcation Point Location and Relocation*

22. We stated in the Second Notice that coordination between subscribers and telephone companies in locating the demarcation point is not an acute or unworkable problem. 92 FCC 2d at 12. Thus, we did not set forth any specific coordination rules in our proposal; instead we left local telephone companies fully responsible for installing protectors and interface jacks in accordance with their reasonable and nondiscriminatory standard operating procedures, subject only to all applicable safety requirements under local tariffs or building codes. GTE, AT&T, and REA support the view that no detailed rules are necessary for coordination purposes. AT&T Comments at 7; GTE Comments at 6-7; REA Comments at 2. New York notes with approval that our demarcation point definition is broad enough to allow for necessary flexibility in the physical and electrical characteristics associated with most installations. New York Comments at 3.

23. However, as previously discussed, several parties urge that we require the demarcation point in multi-unit buildings to be located inside each individual unit. For its part, California seeks a definition that would require an *indoor* demarcation point in the vicinity of the protector for *all* building types, including single unit dwellings. California argues that an outdoor demarcation point consisting of a modular plug and jack would be subject to corrosion since there is no reasonably priced weatherproof protection for a modular connection at this time. California Comments at 2. GTE replies that we should not so limit flexibility in locating the demarcation point because adequate weatherproofing may be developed in the future. GTE Reply at 10. In addition, NATA expresses concern about leaving demarcation point location to the telephone company's "reasonable and nondiscriminatory" practices, asserting that "reasonable and nondiscriminatory" takes "strange twists in the marketplace." In support of this assertion, NATA submits a letter sent from General Telephone Company of the Midwest to an equipment vendor. The letter informed the vendor that when a customer buys equipment from a private individual or interconnect company GTE will provide the interfacing device at the protector or equivalent and will not run additional cable or

[18] *See* paras. 53-56 *infra*.

inside wire to the key cabinet or PBX cabinet. In light of this telephone company policy, NATA urges that we require the demarcation point to be located at or on the subscriber's premises or within reasonable proximity thereto. NATA Reply at 10, 13. Finally, UTC and IDCMA urge that we state explicitly in our rule that relocation of the demarcation point must be mutually acceptable to the parties and that the cost of relocation requested by the telephone company be borne solely by the telephone company. UTC Comments at 3-4; IDCMA Reply at 5-6.

24. Although we recognize that conflicts may occasionally occur between the telephone company and the subscriber in locating the demarcation point, as NATA points out, we do not believe that this warrants a change in our view that our demarcation point definition provides both the necessary location flexibility and subscriber protection. First, if a telephone company's practice in locating the demarcation point is unreasonable or discriminatory, the subscriber may avail himself of regulatory procedures. Moreover, as noted at para. 14 *supra*, state regulatory agencies are free to establish terms and conditions requiring local telephone companies to terminate network services at or on the subscriber's premises. We remain open to revisiting this matter, however, upon a showing that the flexibility provided by our definition is creating unworkable or widespread problems.

25. As discussed above, we do not believe that the demarcation point should be limited to locations inside each unit of a multi-unit building. We see even less reason to require an indoor demarcation jack in single-unit buildings, as California suggests. Such a requirement would prevent the demarcation point from being located outdoors, even when adequate weatherproofing is provided.[19] The UTC and IDCMA suggestion that relocation of the demarcation point be conditioned on being mutually acceptable to the parties is implicit in our proposed rule, which relies upon the parties involved to coordinate demarcation point identification. Although we recognize that a conflict may occasionally occur, our proposed Section 68.213(b) explicitly states that the telephone company may not discriminate in its treatment of demarcation point location or relocation. We believe this language is adequate to satisfy these commenters' concerns. As noted, should a telephone company's practice be discriminatory, the subscriber may seek relief. We believe that the further proposal that costs associated with telephone company-requested changes in

[19] California's proposal seems to be based upon a fear that telephone companies will install "unweatherproofed" jacks outdoors. As noted in the Second Notice, however, any jacks installed outdoors must be housed in a waterproof enclosure. 92 FCC 2d at 14. Moreover, we doubt, and California has provided us with no reason to believe, that any telephone company would engage in the practice of installing unprotected or environmentally susceptible jacks or jack boxes merely to avoid the occasional need to access an indoor demarcation point.

demarcation location be borne by the telephone company is reasonable. However, the matter of such charges is properly left to state regulatory authorities. Accordingly, we will adopt Section 68.213(b) of the rules as set forth in the attached appendix.

F. *Jack Requirement*

26. In the Second Notice, we proposed that a standard jack be installed by the telephone company at the demarcation point for new COPW or when modifications or additions are made to existing premises wiring. We expressed the view that such a jack and plug arrangement would allow defective COPW to be disconnected quickly and easily from the network and would serve as a uniform and convenient testing point. We concluded that it would not be necessary to install such a jack when a subscriber purchases existing (in-place) wiring, however. We further noted that we would not forbid the telephone company from installing a jack for existing wiring without a direct charge to the customer, either upon sale of in-place wiring or as a matter of normal operating practice on service visits, nor would we forbid the telephone company from providing the subscriber with the option of having a jack installed by the telephone company for a charge. 92 FCC 2d at 14.

27. As noted at paras. 17-19 *supra,* NBFAA and PBFFA argue that subscribers should be permitted to install COPW directly onto the protector, without an interposing telephone company-installed demarcation jack. NBFAA argues that a requirement for a telephone company-installed standard jack at the demarcation point for new or modified wiring is unnecessary since such a jack is not a protective device which will prevent harm to the network. Both NBFAA and PBFFA further argue that if a telephone company-installed jack requirement is, in fact, promulgated, an exception should be made when alarm jacks are installed. GTE, AT&T and IDCMA disapprove of these proposals, while the other commenting parties support in general our proposal to require a demarcation jack for new or modified COPW.[20]

28. The jack we propose to be installed at the demarcation point would allow for quick troubleshooting by the telephone company, and would serve as a convenient subscriber test point. NBFAA and PBFAA have failed to present any compelling reasons for eliminating this requirement and the resulting benefits to the subscriber. In fact, the arguments advanced by NBFAA and PBFAA here were raised in the context of protector access and rejected.[21] The alternative suggestions to allow the subscriber to install alarm jacks as the demarcation jack should likewise

[20] GTE Reply at 16; AT&T Reply at 11-14; IDCMA Comments at 5-6; REA Comments at 2; UTS Comments at 4-5; UTC Comments at 4.

[21] *See* para. 19 *supra.*

be rejected since this will allow subscriber access to the protector, which we have found to create an unwarranted potential for harm.

29. Several other commenters suggest modifications and clarifications to our proposal. UTS, for example, recommends allowing use of an interface device that would be hardwired directly to COPW, but which would contain a switch for disconnection and a jack for testing. UTS proposes that Section 68.104(a), which currently limits the authorized means of connection to the telephone network to a standard plug and jack arrangement, be modified to permit any connection which contains a standard jack for testing purposes and provides an easy means of disconnection. UTS Comments at 4-5. GTE replies that this proposal should be rejected for two reasons: (1) allowing variations from the standard means of connection will upset a uniform federal program; and (2) the device provides no benefits that cannot be achieved with a standard jack. GTE Reply at 23-24.

30. We believe that UTS's proposal would create unnecessary practical problems. Allowing variations from a standard means of connection would require a case by case determination as to whether such a device should be permitted. In short, we find the disruption in the administration of our program and resulting confusion is not justified. UTS has offered no benefits that its proposed interface device would provide that could not be achieved with a standard jack and plug. Indeed, as GTE points out, the device appears to be more costly than a simple jack because it contains a jack *and* a switch in an enclosure. GTE Reply at 23. If in the future we are presented with an interface device which provides greater benefits to the public, *e.g.*, is cheaper and of greater utility than a standard plug and jack arrangement, we remain open to an appropriate rulemaking petition to incorporate it under Part 68. This, however, does not preclude a network interface device that incorporates a standard jack for testing in conjunction with other weather resistant means of connection, if approved by the state public utility commission.

31. In the Second Notice, we also asked for comments regarding whether a jack should be required to be installed at the demarcation point when additions are made by a subscriber to existing wiring through an existing telephone company-installed jack.[22] GTE recommends that a telephone company-provided interface be installed at the demarcation point before modifications to existing premises wiring are undertaken,

[22] As stated in the Second Notice, a subscriber who plugs a "connectorized" extension cord into an existing room or office jack is not distinguishable from one who merely plugs in a terminal device. Noting that neither situation warrants regulatory restriction, we concluded that a subscriber who uses extension cords in conjunction with existing premises wiring will be considered to have existing premises wiring only and will not be required to install a jack at the demarcation point. 92 FCC 2d at 15. No party has taken issue with this conclusion.

and suggests language to this effect be included in the rules. GTE Comments at 7-8. California and AT&T, on the other hand, argue that a jack should not be required at the demarcation point when a subscriber extends COPW from an existing utility-installed jack. California Reply at 1-2; AT&T Reply at 5-6.

32. We agree that a jack near the protector need not be required as a condition precedent to additions through an existing telephone company-installed jack since the wiring standards we adopt herein and the ease of disconnection of the additional wiring offer adequate network protection. Of course, there would be no prohibition against the telephone company installing a demarcation point jack near the protector upon subscriber augmentation of existing wiring, provided that jack installation is a routine practice of the telephone company and there is no unreasonable delay to the subscriber by the practice.

33. We note that this specific issue is interrelated with CC Docket No. 79-105 concerning the deregulation of one and two-line inside wiring. The assumption underlying the comments of GTE, AT&T and California is that the demarcation point is located at or adjacent to the protector. Thus, their concern arises as to whether a jack is required to be installed at the demarcation point. As discussed at para. 7 *supra,* however, our definition is flexible enough to allow the demarcation point to be located anywhere between the protector and the first jack. Until (and if) one and two-line inside wiring is deregulated, which will in most cases require a demarcation point in the vicinity of the protector, there is no reason why an existing jack cannot serve as the demarcation jack. We recognize that this might have the effect of creating more than one demarcation point in a given premises. For example, if wiring is extended from several existing jacks, several demarcation points may exist. Such an apparent anomaly is not unworkable or necessarily inconsistent with our overall intent to identify the location of a network-COPW interface. Accordingly, our definition in Section 68.3(h) of the rules will be understood to include the possibility of more than one demarcation point until CC Docket No. 79-105 is resolved.

IV. *STANDARDS FOR ONE AND TWO-LINE PREMISES WIRING INSTALLATIONS*

34. Aside from the issue of demarcation point definition, the Second Notice requested comment on whether one and two-line wiring should be included in the Part 68 program and, if so, what standards should be adopted to ensure that no harm is caused to the network. Harm, as defined in Section 68.3(g) of the rules, 47 U.S.C. § 68.3(g), includes electrical hazards to the telephone company personnel, damage to telephone company equipment, malfunction of telephone company billing equipment, and degradation of services to persons other than the user of

the subject terminal equipment, his calling or called party. The remainder of this *Order* will address the issues raised in this context.

A. *Section 68.2, Scope*

35. While all parties support the inclusion of one and two-line non-system COPW in Part 68, three parties suggest that we revise Section 68.2, 47 C.F.R. § 68.2, *Scope,* to state explicitly that such COPW is included. New York Comments at 2-3; AT&T Comments, Appendix at 2; GTE Reply at 19.[23] No one opposes the proposal. In the interest of clarity we will add a new subsection (4) to Section 68.2(a) that expressly mentions one and two-line non-system wiring.[24]

B. *Merger*

36. The Second Notice proposed to add a new Section 68.213 to Part 68 that would provide standards for the installation of unprotected one and two-line COPW.[25] Additionally, we sought comment on whether we should, in the alternative, alter the existing Part 68 rules for multi-line system wiring, 47 C.F.R. § 68.215, and merge them with regulations for non-system wiring. 92 FCC 2d at 21. Although some parties address this matter directly, most of the comments dealing with this issue do so in the context of whether installers' qualifications should be the same for both system and non-system wiring installations. The consensus is that system and non-system wiring should be treated differently under Part 68.[26]

37. AT&T, for example, asserts that one and two-line wiring and multi-line wiring installations are significantly different undertakings and should be treated differently under Part 68. More specifically, AT&T urges that we leave unchanged the existing regulatory scheme of Section 68.215, which, in short, permits system premises wiring to be installed

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[23] In addition, AT&T suggests that the introduction of rules for non-system COPW necessitates a new "grandfather" provision to make clear that existing non-system wiring may remain connected to the network for its useful life without alteration. AT&T Comments, Appendix at 3. Because the rules adopted in this proceeding will not preclude telephone companies from continuing to offer non-system premises wiring on a tariffed basis, we do not believe that a grandfather provision is appropriate at this time.

[24] Similarly, we will amend Section 68.1, Purpose, to state explicitly that COPW is included in Part 68. *See* Appendix.

[25] Protected one and two-line COPW is wiring which is located electrically behind registered (or grandfathered) terminal equipment or protective circuitry which assures that electrical contact between the wiring and commercial power wiring or earth ground will not result in hazardous voltage at the telephone network interface. Unprotected non-system wiring is all other non-system wiring. Because non-system wire will generally be purchased independent of the terminal equipment, most non-system installations will be encompassed by the Part 68 program.

[26] *See* AT&T Comments at 11-17; GTE Comments at 10; UTS Comments at 10; UTC Comments at 4-5; IDCMA Comments at 8; NATA Comments at 26-27; USITA Comments at 2-3.

under the supervision of either a person properly authorized by the equipment registrant, typically the manufacturer, or by a professional engineer licensed in the jurisdiction in which the installation is performed. AT&T observes that the requirement for a registrant-authorized supervisor harnesses the natural self-interest of registrants to assure that the network remains protected. AT&T Comments at 12. However, because terminal equipment designed for use in one and two-line services is registered and generally has no wiring "behind" it, AT&T reasons that the equipment manufacturer is not properly held accountable for risks of harm associated with non-system COPW. AT&T concludes that Part 68 accountability for non-system COPW "is best achieved through the customer because the customer is the only person that is in a position to remain continuously responsible for the wiring." AT&T Comments at 15. GTE similarly states that the system wiring rules should remain without modification while separate rules are promulgated for non-system wiring. GTE Comments at 10. For its part, IDCMA recommends that we specifically note that the rules promulgated for non-system wiring are not intended to be associated in any way with system wiring. IDCMA Comments at 8. And, as indicated above, the commenters support different qualification requirements for installers of system and non-system wiring.[27]

38. We agree that system wiring is significantly more complex than non-system and therefore it is appropriate to treat such wiring differently under Part 68. System wiring often involves wiring fields that, if misrouted, may cause billing errors or network disruption. Moreover, cross-connect blocks and other system wiring are frequently located in areas where there is ready access to other communications and power cables that, if connected, might lead to harm to the network, as well as to telephone company personnel and third parties. In addition, system wiring generally involves a relatively complicated array of facility ordering codes, involving pin sequences that must be correctly arranged to assure proper system function. Non-system wiring, on the other hand, usually is connected to the network by a simple plug at a well-insulated, safe location. In view of these factors, we agree that a different set of standards is appropriate. We also agree, as suggested in the Second Notice, that the existing rules for system wiring have proven effective and should not be modified.

39. To clarify this bifurcated framework, we will revise the caption of Section 68.215 to read, "Installation of Other than 'Fully-Protected' System Premises Wiring." This revised caption will parallel the language in the caption of Section 68.213 which will read, "Installation of Other than 'Fully-Protected' Non-System Premises Wiring." It also should

[27] *See* paras. 40-43 *infra.*

prevent any potential confusion as to which rules apply to which type of wiring. We will also adopt the following wiring definition in Section 68.3:[28]

> *Non-System Premises Wiring*: Wiring which is used with one and two-line business and residence services, located at the subscriber's premises.
>
> (1) Fully Protected Non-System Premises Wiring. Non-system premises wiring which is electrically behind registered (or grandfathered) equipment or protective circuitry which assures that electrical contact between the wiring and commercial power wiring or earth ground will not result in hazardous voltages at the telephone network interface.
>
> (2) Unprotected Non-System Premises Wiring: All other non-system premises wiring.[29]

C. *Installers' Qualifications*

40. We observed in the Second Notice that comments in response to our First Notice generally supported the proposition that the qualification requirements imposed on persons performing system wiring operations should not apply to installers of non-system wiring.[30] 92 FCC 2d at 23-24. We further noted that leaving the system wiring rules unchanged while dispensing with qualification requirements for one and two-line wiring would create the anomalous situation of imposing such requirements where they may not be necessary as a practical matter, since system wiring will normally be performed by competent installers, while not imposing requirements where they might be better justified. 92 FCC 2d at 24.

41. Against this background, we proposed four options to determine who should be authorized to install one and two-line wiring. The first option would "umbrella" the licensing/qualification requirements of local electrical and building codes and state regulatory options for all forms of wiring, system and non-system. The second option would restrict untrained persons to certain types of wiring installations, *e.g.*, non-system

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[28] The definition of "premises wiring" presently contained in Section 68.3(t) refers to system premises wiring. To avoid any confusion, we will recaption the definition to read "System Premises Wiring" and will change the references to premises wiring in the subheadings to "system premises wiring." *See* Appendix.

[29] AT&T urges that we note in our definition of non-system wiring that passive devices used in wiring operations, such as connectors, blocks and jacks, are considered part of the COPW and are included in Section 68.213. AT&T Comments, Appendix at 5. We are currently considering the deregulation of cords and other passive devices in RM-3227 in this docket. *See* First Notice, 85 FCC 2d at 879-880. Indeed, pending disposition of that rulemaking we have exempted extension cords and electrically transparent adapter boards from the registration program. Public Notice #20851, released Aug. 2, 1982. We therefore do not believe it appropriate to act upon AT&T's proposal at this time.

[30] Section 68.215(c) requires that installations of system wiring be supervised by either an individual with training and authority from the equipment registrant or by a licensed professional engineer. 47 C.F.R. § 215(c).

surface wiring, in an effort to limit potential harm. The third option simply would continue to require certain qualifications for system wiring installation while not imposing those requirements for one and two-line wiring. The fourth option would require that installers secure bonding to indemnify subscribers or carriers for improper wiring. 92 FCC 2d at 25-26.

42. Apparently, the anomaly that we noted in the Second Notice does not evoke the commenters' concern. GTE, New York, USITA, California, UTS and AT&T explicitly support Option 3, which would require certain qualifications for installations of system wiring but impose no qualifications for non-system wiring installations. These parties assert that telephone subscribers are capable of adequately installing non-system wiring without special training or qualifications and that we should "keep simple wiring simple" by avoiding unnecessary complications which would arise from licensing or competency requirements.[31] At the same time, these parties recognize that special qualifications are necessary to install system wiring properly and urge us to leave in place the requirements for installation supervisors. New York notes that Option 3 is very similar to the position adopted by the New York PSC in 1980, while California notes that it has had a good experience in allowing installation of one and two-line wiring by subscribers. New York Comments at 6; California Comments at 4. None of the other commenters oppose Option 3.[32]

43. In view of our preference to avoid unnecessary regulatory controls, the minimal potential dangers to adequate and properly installed non-system wire, and the consensus that untrained subscribers can properly install non-system wiring, we believe that no new regulatory infrastructure is necessary for non-system installers.[33] Non-system wiring is usually connected to the network by a simple plug and we believe that such installation will present no significant problems for telephone subscribers. System wiring, on the other hand, is significantly more

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[31] New York Comments at 6; GTE Comments at 9; USITA Comments at 4; California Comments at 3-4; UTS Comments at 6; AT&T Reply at 16.

[32] UTS states that either Option 3 or Option 2, which would restrict the untrained to certain types of wiring installations, is acceptable. UTS Comments at 5. REA, however, argues that Option 2 is unnecessarily restrictive. REA Comments at 2. Northern Telecom and CCS oppose Option 1, which would "umbrella" local requirements, with CCS urging that the telephone company become involved with the pre-wire company and provide inspection service on pre-wire installations. Northern Telecom Reply at 2-4; CCS Comments at 4. NATA is the only party that supports the "umbrella" approach of Option 1. NATA Comments at 26-27.

[33] We also reject CCS's proposal that telephone companies be required to provide inspection service on pre-wire installations. As discussed previously, the responsibility for non-system COPW falls on the subscriber – not the telephone company. The extraordinary telephone company procedures under Section 68.213(g), which will be adopted for non-system COPW (*see* para. 84 *infra*), should be adequate for any telephone company inspections that may be required.

complex and thus has greater potential of being improperly installed and causing network harm. We believe that the qualification requirements currently contained in Section 68.215(c) will continue to ensure that system wiring installations are supervised only by those adequately trained to do so and that the network remains uncompromised. We will therefore adopt Option 3. A new Section 68.213(c) regarding qualifications for installers of non-system wiring, as proposed in the Second Notice, is therefore unnecessary.[34]

D. *Specific Proposals for Changes in Qualification Requirements for Installation Supervisors Under Section 68.215(c)*

44. Aside from the matter of qualification requirements for installers of non-system COPW, two parties urge changes in the qualification requirements for supervisors of system wiring installations under Section 68.215(c). Both FEA and Riverside propose that the authorized categories of supervisors for system wiring installation be expanded.

45. FEA urges that certain U.S. Government trained personnel, notably military personnel prepared by military vocational training, are qualified to install system wiring.[35] FEA Comments at 2-5. FEA asserts that despite this, Section 68.215(c) requires all FEA supervisors to be "retrained" by equipment manufacturers, an extremely costly step that does not assure more qualified supervisors, or to be licensed in the jurisdiction in which the installation is to be performed, requiring relicensing each time personnel are transferred to new duty stations, likewise without improving qualifications. FEA Comments at 4, 7. FEA thus urges us to amend Section 68.215(c) to include personnel trained at U.S. Government training facilities as qualified supervisors of system wiring installations.[36]

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[34] In lieu of a Section 68.213(c) dealing with installers' qualifications, AT&T proposes a Section 68.213(c) dealing with subscribers' responsibilities in installing one and two-line wiring. AT&T's proposal also contains a provision by which the subscriber agrees to hold the telephone company harmless from any liability or claims resulting from the subscriber's installation of COPW. AT&T Comments, Appendix 8. We reject AT&T's proposal. The subscriber responsibilities listed in its proposal – such as advance notice to the telephone company and acceptance testing – are contained elsewhere in Section 68.213. Moreover, the provision exculpating the local telephone company is inappropriate. We believe an expression of subscriber responsibility for COPW is sufficient and that remedial resolution of potential liability should be controlled by normal tort and contract law principles.

[35] FEA has incorporated by reference into its comments a Petition for Rulemaking that it filed with the Commission in June, 1982. FEA's comments regarding installation supervisors' qualification requirements echo the arguments advanced and proposals made in its Petition for Rulemaking.

[36] FEA also proposes that Section 68.222(c), AIOD trunk and station number verification, and Section 68.216, repair of registered terminal equipment and registered protective circuitry, be similarly amended. FEA Comments at 3. Because these proposals are based

46. Both AT&T and GTE object to FEA's proposal. Both assert that the existing chain of responsibility between registrants, installation supervisors and the Commission – which assures that system wiring will not cause harm to the network – would be seriously undermined if FEA's proposal were adopted. They further argue that the Commission should not allow itself to become the arbiter of whether communications training programs are adequate. Moreover, both AT&T and GTE suggest that designating a single, corporate level supervisor for purposes of satisfying Section 68.215(c) would accommodate FEA's concerns about having to retrain personnel without compromising the existing regulatory scheme. Both commenters cite *Amendment of Part 68*, 92 FCC 2d 670 (1982), where the American Association of Railroads (AAR) was denied reconsideration of a Commission order which declined to create an exception to Part 68 for electric and gas companies historically excepted from tariff provisions prohibiting interconnection of technical equipment. AT&T and GTE note that in denying AAR's petition, the Commission stated that Section 68.215(c) permits a company to designate one supervisor who meets the requisite qualifications to be responsible for *all* wiring installation and maintenance work that the company conducts and that the rule does not require that each supervisor on every job site meet the requirements of Section 68.215. AT&T Reply at 20; GTE Reply at 20.

47. FEA acknowledges the AAR decision in its reply comments but apparently argues that its program provides more assurances against network harm than do the Part 68 requirements. FEA notes that its proposal would always require installation by graduates of its training program, and it would always require on-site supervision, while Section 68.215(c) allows persons to perform system wiring installation operations without proof of training and without on-site inspection by a qualified installation supervisor. Moreover, even if supervisory responsibility is delegated, FEA indicates that it would require all on-site installers to be properly trained by Section 68.215(c)-qualified supervisors. At which point, FEA argues, the on-site installers "would be, for all intents and purposes, installation supervisors" and should be explicitly authorized to install such wiring under Section 68.215(c). FEA Reply at 7. In response to the contention that granting its request would undermine the intent of Section 68.215(c), FEA states that because it is dependent upon the proper functioning of the network for national defense and security purposes, it has a sufficient vested interest in system wiring to carry the ongoing responsibility for the proper installation of such wiring. FEA Reply at 4.

48. Adoption of FEA's proposal would alter the existing regulatory framework that identifies responsibility for system wiring operations. In

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upon the same concerns that underlie the requested modification of Section 68.215(c), they will be resolved in accordance with our discussion herein.

order to maintain the integrity of the Part 68 program we have not, in the past, granted exemptions from Part 68's requirements absent a compelling public interest justification for doing so. As the Commission stated in the AAR decision:

> [A] showing that a particular entity is technically capable of interconnecting its own equipment with the telephone network (or has done so in the past) does not in and of itself justify an exception under our previously established public interest standards embodied in Part 68. 92 FCC 2d at 674.

Because AAR had not demonstrated that the burden on it to comply with Part 68 was unreasonable or contrary to the public interest, the Commission denied its petition. Likewise, we will not expand the categories of authorized supervisors under Section 68.215(c), as FEA requests, without a showing that compliance with Part 68 is unreasonably burdensome to FEA or contrary to the public interest.

49. As FEA acknowledges in its reply comments, not *all* its installation supervisors are required by Section 68.215(c) to be retrained by equipment manufacturers or to be licensed in the state where the wiring is to be installed. Any supervisor meeting the requisite qualifications may delegate on-site supervisory responsibilities to other personnel. FEA has failed to demonstrate that securing manufacturers' authorizations on behalf of selected, qualified supervisors is unduly burdensome[37] or contrary to the public interest.[38] We disagree with FEA's further argument that its on-site installation personnel, having been trained by qualified supervisors, will be, in effect, installation supervisors themselves and should be authorized as such in the rules. FEA has overlooked the fact that under Section 68.215(c) the responsible individual, *i.e.*, the installation supervisor, must still be trained and authorized by the registrant or licensed in the jurisdiction where the wiring is to be installed. FEA's proposal, however, would allow personnel not meeting Section 68.215(c)'s requirements to supervise installation. This will erode the manufacturer-installer agency relationship and licensing scheme underly-

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[37] Indeed, the concerns raised by FEA in its comments are nearly identical to those raised by AAR – and rejected by the Commission. AAR argued that its personnel were technically qualified to connect equipment and that the burden on it to send each supervisor to each registrant for training was unreasonable. The Commission noted that this was a misinterpretation of the rule. In response to AAR's further argument that filing affidavits under Section 68.215(e) imposed an additional burden on it, the Commission stated that the installation supervisor designated under Section 68.215(c) may file one affidavit for the entire company each year with each local telephone company – the "Blanket Affidavit" procedure. The Commission concluded that Section 68.215(c)'s requirements did not impose an unreasonable burden upon AAR.

[38] In Connection of Terminal Equipment to the Telephone Network, CC Docket No. 78-331, 44 Fed. Reg. 66825, Nov. 21, 1979, the Commission excepted government agencies from Part 68's requirements in instances where disclosing equipment, locations or projects would compromise national security and defense. No such concerns are involved here.

ing Section 68.215(c), not merely codify the practical result of the delegation of supervisory responsibilities, as FEA asserts.

50. Finally, we note that while we might accept the proposition that FEA personnel, as well as many other categories of trained persons, are qualified to perform system wiring operations, authorizing new categories of supervisors under Section 68.215(c) would create the practical dilemma of how to ascertain which training programs offer adequate safeguards against incompetent procedures and network harm. Put simply, it is not the function of this Commission to pass judgment on the myriad of technical training programs available in the nation. The broad institutional guidelines set forth in Section 68.215(c) – which have proved adequate to protect the network from harms associated with system wiring installations – provide the most practicable program. In balancing between expending extraordinary federal resources to institutionalize a training program approval process and relying on the industry to comply with the generalized provisions of Section 68.215(c), we believe the public interest requires us to choose the latter.

51. In sum, we see no reason to disturb the Part 68 program to accommodate FEA's proposal. FEA has failed to show that compliance with Section 68.215(c) is unreasonably burdensome or contrary to the public interest. We are prepared to review this matter, however, upon a showing that FEA is faced with undue difficulty obtaining agency relationships with its suppliers.

52. The other proposal to expand the authorized categories of installation supervisors was made by Riverside. Asserting that holders of General Radio Operators licenses are "at least as qualified" as licensed electricians to install COPW, Riverside proposes that Section 68.215(c) be amended to permit these license holders to supervise installations of unprotected system equipment and wiring.[39] Riverside comments at 2-4. Riverside, however, has failed to present any evidence that Section 68.215(c) imposes an undue burden upon it or that there is a public interest justification in adopting its proposal. For these reasons, we will reject Riverside's proposal.

E. *Simple Installations*

53. We noted in the Second Notice that if we permit one and two-line non-system wiring to be installed by untrained subscribers, it might be

[39] In its comments in response to the First Notice, Riverside requested that we institute examination and licensing procedures similar in principle to licensing of radio operators to identify qualified installers of COPW. We rejected this proposal in the Second Notice, noting that Riverside had not shown a compelling public interest justification to establish a complex new licensing scheme, nor had it shown that such a program could be relied upon to assure that no harm would be caused to the network by those so licensed. 92 FCC 2d at 24 n. 29.

desirable to give these installers some advice in order to avoid improper installations and any resulting harm to the network. To this end, we proposed a "simple installations" rule providing guidelines concerning the installation practices that should be avoided.[40] 92 FCC 2d at 28-30. The guidelines were not mandatory, that is, installations which followed such guidelines would be proper although other installations which violated the guidelines might also be proper under certain conditions. Our intent was merely to place untrained installers on notice that they might need to get advice on non-conforming installations. Because these guidelines are thus merely advisory, we believe that they are more appropriately contained in an informational bulletin rather than codified in the FCC rules. In this way, we hope to avoid the guidelines being interpreted as a formal rule and as unnecessarily restricting installations which, under proper circumstances and using other materials, might be entirely appropriate. In addition, we believe that because most subscribers will not have ready access to FCC regulations, disseminating a brochure containing installation guidelines is advisable.[41]

54. None of the commenters opposes our proposed guidelines, although some suggest additions to the list of guidelines. REA, for example, suggests that we add two locations – (1) under water pipes and (2) between two structural studdings where electrical wiring is present – to the list of locations which may not be suitable for COPW. REA

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[40] The guidelines proposed were as follows:

(1) The following locations may not be suitable for all forms of telephone wire, because of the insulation of such wire, and should be avoided in simple installations:

(i) Damp locations.

(ii) Wire runs which provide support for other objects.

(iii) Excessively hot locations in proximity to steam pipes, heating ducts, hot water pipes, etc.

(2) COPW should follow structural members such as joists or studs. If it becomes necessary to route wire perpendicular to joists or studs, bored holes through the center of such members are a preferred method of providing support. If it becomes necessary to span the lower edge of joists, run the wire no more than five (5) inches from a wall to avoid possible damage to the wire.

(3) Wherever conduit (or other ducts) is available or is required by applicable codes for telephone wiring, it may be used solely for telephone wiring (or for non-hazardous voltage sources), and may not contain other electrical wires.

[41] Although our specific concern here is to protect the network from harm caused by the direct connection of premises wiring, the simple installation guidelines are also designed to prevent harm which may be caused to subscribers by improperly installed non-system wiring. We believe that it is in the public interest to disseminate such information.

Comments at 2-3.[42] REA also recommends that we add explicit instructions regarding tip and ring pin assignments to guarantee proper operation of push button telephone sets. REA argues that absent a polarity guard, which a large number of sets do not have, improper polarity connection will prevent the subscriber from making outgoing calls. REA Comments at 3. In the interest of network protection and subscriber safety we will include REA's proffered "under water pipes" as a location which may not be suitable for one and two-line COPW. We do not agree, however, with REA's suggested restriction against locating COPW between two structural studdings where electrical wiring is present. As we noted in the Second Notice, this restriction is unnecessary because no conductor separation at all is required between telephone wiring and all current forms of power wiring used in premises where one and two-line wiring is likely to be installed.[43] We also do not think it appropriate to include explicit instructions regarding tip and ring pin assignments in push button telephones. Our guidelines should provide only general advice designed to protect the network and the subscriber; providing detailed installation instructions to cover every possible problem in installation, such as improper pin assignments in push button phones, exceeds our purpose in this proceeding.

55. GTE, for its part, requests that we add a paragraph regarding the safety hazard that could be caused if the protector ground wire is disconnected. GTE Comments at 17. We agree that subscribers intending to perform non-system wiring installations should be warned against manipulating the protector case or mounting. Indeed, the potential harm which could be caused if the protector were damaged is the reason we decided to assign responsibility for the protector to the telephone company. Accordingly, we will add the following to our guidelines:

> When making the final connection of the premises wire to the demarcation jack, take extreme care to ensure that the protector case or mounting is not moved about or manipulated in a manner that would cause loosening or removal of the ground wiring.

56. Finally, AT&T urges us include a warning that COPW should be disconnected from the network when performing any operations and when trouble is experienced. AT&T Comments at 16.[44] Failure to disconnect COPW during work operations could result in shock or injury by inadvertent commercial power crosses on a telephone line or if an

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[42] GTE supports the first of these but notes that we already considered and rejected the latter in the Second Notice at 29 n. 34.

[43] *See* 92 FCC 2d at 29 n.34.

[44] AT&T also notes that, consistent with telephone company practice, wiring should be run no more than three inches from a wall when spanning joists, not five inches, as proposed in Section 68.213(h)(2). AT&T Comments, Appendix at 24. We have no objection to this suggestion and will amend the guideline accordingly.

incoming call were to be received while work was being done on bare wire. COPW should, of course, be disconnected when trouble is experienced to prevent possible harm to the network. We will therefore also add the following to our guidelines:

> All wiring should be disconnected from the telephone line during work operations, or when trouble is experienced in order to determine the source of the malfunction. If the wiring is the cause of the malfunction, it should remain disconnected until the problem has been corrected.

F. *Notice/Documentation Requirements*

57. Another issue raised in the Second Notice concerns the nature of a notice requirement to the local telephone company prior to installation of non-system COPW. Recognizing that non-system wiring is not as complex as system wiring, we suggested that a written notice requirement – as currently exists for system wiring under Section 68.215(e) –would be unnecessarily burdensome for the average telephone subscriber. We suggested that oral notice to the telephone company should be sufficient but that the notice should include information similar to what is required for system wiring, *i.e.*, brief descriptions of the wiring and other materials to be used, and a general description of the wiring's attachment to the building structure. We also proposed that notice be given at least five days before connection to the telephone network. 92 FCC 2d at 22-23.

58. The parties commenting on these issues unanimously support an oral notice requirement,[45] although some suggest that the contents of that notice be simplified. UTS, for example, suggests that the required information be limited to the registration number of the wire or the type of physical connection, if other than a standard jack. UTS Comments at 6.[46] GTE, for its part, urges that a brief description of the wiring is not necessary if the subscriber states that he or she will comply with all applicable rules and codes. GTE Comments at 14-15. New York believes that a description of the location of the demarcation point to which the COPW is connected and a statement that all rules and codes will be complied with is sufficient. New York Comments at 5-6. AT&T supports the suggested simplifications in our proposed notification rule. AT&T Reply at 17.

59. In light of the commenting parties' support for our position that oral notice is sufficient for non-system wiring installations, we will adopt such a requirement in the rule. With respect to the content of that notice, we agree that some simplification of the rule proposed in the Second

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[45] GTE Comments at 14-15; AT&T Comments at 27; UTS Comments at 6; NATA Comments at 26; California Comments at 6; New York Comments at 5; FEA Comments at 5-6.

[46] UTS's proposal assumes that a registration program for one and two-line wiring will be adopted. As we discuss below, we do not believe a standard registration program is necessary. *See* para. 80 *para.*

Notice is warranted. We believe the likelihood that one and two-line wiring will be improperly installed, causing network harm, is not substantial. Moreover, Part 68 material standards and acceptance testing requirements offer a significant means of preventing the occurrence of potential harms.[47] Indeed, even if there is a problem with the COPW, the jack through which it connects to the network serves as an easy means of disconnection. Thus, we believe that the proposed requirement for descriptions of materials other than wire and a description of the wiring's attachment to the building structure are not warranted as a means to prevent network harm, and that the administrative burden on the telephone company to record this information exceeds any discernible benefit. We believe, however, that the manufacturer's name or brand name and model number, if any, of the wire should be provided so that the telephone company can ascertain whether substandard wire is planned to be used, and, if so, to prevent it from being installed. *See* para. 80 *infra*. Thus, we will require that notice to the local telephone company include only the number of the subscriber's line, the location of the jack to which the COPW is to be connected, a statement that all applicable rules and codes will be complied with, and the name of the wire manufacturer or brand name and model number, if any, of the wire.

60. Several parties also argue that the five-day advance notice requirement set out in the proposed rule is unnecessary, although no party suggests that advance notice be eliminated entirely. California, for example, suggests that the wiring installer merely give advance notice of the work in accordance with the utility's standard operating procedures. California Comments at 4-5. GTE urges that we eliminate the five-day advance notice of the specific dates the wiring will be installed (GTE Comments at 14-15), while FEA asserts that one day's notice is sufficient. FEA Comments at 5-6.

61. In view of the minimal potential dangers of adequate and properly installed one and two-line wiring, as discussed above,[48] we are amenable to requiring "mere" advance notice. This will allow the telephone company to ascertain whether substandard wire is planned to be used, to install the required demarcation jack if one is not already in place, and to verify that the subscriber is at least aware that FCC and local rules for one and two-line COPW may apply. Such notice is required when terminal equipment or protective circuitry is connected to the telephone network, 47 C.F.R. § 68.106, and has proven satisfactory. We will therefore eliminate the five-day notice requirement and simply require the customer

[47] *See* discussions regarding acceptance testing and material requirements at paras. 63-68 and 69-75 *infra*.

[48] *See also* 92 FCC 2d at 16-17.

to give the telephone company advance notice that one and two-line wiring will be installed, with no maximum or minimum limit.

62. In sum, we will adopt the following as Section 68.213(e):

> *Notice to the telephone company.* The subscriber shall notify the local telephone company in advance of each operation associated with the installation, connection, reconfiguration or removal (other than removal by disconnection at a standard jack) of premises wiring to or from the telephone network. The following information shall be provided: (1) The responsible subscriber's telephone number(s); (2) a description of the location of the jack to which the premises wiring is to be connected; (3) a statement that all applicable rules, building codes and electrical codes will be complied with; and (4) the wire manufacturer, or brand name, and model number, if any, of the wire used.

G. *Acceptance Testing*

63. In view of our decision that no special qualifications are necessary to install one and two-line COPW, acceptance testing takes on increased importance as a means of differentiating good installations from faulty ones that could cause network harm. In the Second Notice, we proposed that Section 68.215(f)'s requirement that system wiring be tested by the installer for hum apply to one and two-line installations as well. We also proposed that a "ringback" testing requirement be adopted for one and two-line COPW installations. 92 FCC 2d at 26-27. "Ringback," *i.e.*, reverting-calling testing, involves the subscriber dialing a reverting-calling number after installation has been completed and, after hearing a unique tone, hanging up. The central office then automatically returns a ringing signal which allows the installer to determine that the non-system operations have been performed properly. (The test is generally used with a standard telephone, which will ring on receipt of the returning ringing signal.)

64. All of the commenters support some form of acceptance testing. REA, NATA, California and UTS explicitly support a mandatory ringback testing number to be provided by the telephone company.[49] GTE, on the other hand, argues that use (and misuse) of a ringback number could affect network operations and other subscribers' service when party line service is involved. GTE Comments at 15. GTE observes that although many central offices have equipment allowing a reverting call to ring back a subscriber's line, this equipment is installed primarily to allow party line subscribers to signal other parties on the same line. A Commission mandate that subscribers use the reverting call equipment for acceptance testing will, according to GTE, lead to a degradation of service to party line subscribers unless certain protective equipment is added. GTE proposes that in lieu of a ringback number, a third person should be required to place a call to the line being tested. When this method cannot

[49] REA Comments at 2; NATA Comments at 27; California Comments at 4; UTS Comments at 7.

be used easily, the telephone company's ringback test facilities may then be used. GTE Comments at 16. AT&T supports the notion of having a third person dial the line being tested. AT&T Reply at 17.

65. GTE presents no support for its assertion that demand for ringback testing and access to signalling equipment will affect party line service or require that new equipment be added. We note that the ringback testing number will be utilized only when new wiring is installed by subscribers and thus does not appear to create a significant demand for access to signalling equipment. At worst, the ringback number would also be used on occasion to test terminal equipment, which we believe is unlikely to cause a discernable degree of adverse impact, even to party line subscribers. We hesitate to foreclose to the majority of subscribers the utility and convenience of a ringback number on the basis of GTE's unsupported assertions, particularly in view of the decreasing number of party line subscribers nationally. *See* 92 FCC 2d at 37. Moreover, even if new equipment were needed in some cases to prevent inconvenience to party line subscribers, as GTE suggests, we believe that the benefits afforded by the availability of a testing number justifies the addition of such equipment. We therefore reject GTE's proposal.[50]

66. We recognize, however, that subscribers may prefer to test by having a friend place a call to them, as GTE suggests. UTS similarly suggests that as an alternative to calling the ringback number a subscriber should be permitted the option of having another person dial the line being tested. UTS Comments at 7. We have no objection to this method because it would accomplish the same purpose as the ringback test and we will permit it as an alternative method of acceptance testing.

67. UTS further suggests that if the CPE to be connected to the non-system COPW does not provide signalling (such as a speakerphone or an auto dialer), a telephone compatible with the line to be tested be used to perform the test. UTS Comments at 7. We agree. A ringback testing requirement benefits both the installer and the telephone company by ensuring that the wiring has been installed properly and thus will not cause harm to the network. This assurance should not be eliminated merely because the CPE connected to the COPW at that time may not respond to ringing.

68. Therefore, we will adopt as Section 68.213(f) the following provisions for testing installations of one and two-line COPW:

> *Acceptance testing*: Non-system premises wiring installed in accordance with these rules shall be tested under the acceptance tests specified in this sub-section whenever an operation associated with any installation, reconfiguration or removal of wiring (other than final removal) is performed. A telephone which responds to ringing shall

[50] The ringback number requirement adopted herein does not apply to party line subscribers, to whom Part 68 does not apply.

be used to perform the tests when the CPE connected or to be connected to the premises wiring does not itself provide ringing.

* * * * *

(2) "Ringback" testing. A telephone connected to the subscriber's line(s) shall be used as follows:

(i) Make a "ringback" call (obtain from the local telephone company information on how to make "ringback" test calls), or have another person dial the number of the line being tested.

(ii) Permit the telephone to ring for one minute (usually twelve rings).

(iii) Lift the handset off the telephone for five seconds or longer, as necessary.

(iv) Hang up. Check return of normal dial tone.

H. *Material and Workmanship Requirements*

69. The Second Notice also addressed material standards for non-system COPW and workmanship standards for wiring installation. It essentially proposed to apply the existing workmanship and materials standards contained in Section 68.215(d) to the non-system wiring environment in Section 68.213(d). It proposed only one minor variation, which was to incorporate a conductor separations table into the non-system wiring rules. 92 FCC 2d at 21-22.[51] In light of our decision to disseminate an instructional bulletin containing guidelines for installation of non-system COPW, however, we believe it appropriate to incorporate the workmanship and installation standards contained in proposed Section 68.213(d) in that bulletin. This will consolidate all guidelines for installation (directed at subscribers) in our bulletin, while delineating the material standards for that wire (directed at manufacturers) in a separate rule.[52]

70. Several parties suggest modifications to the workmanship standards set out in our proposal. Four commenters point out an apparent error in the proposed separations table, noting that the minimum distance from COPW to electric supply open wiring not over 300 Volts should be 2 inches (51 mm) and not 2 feet (.6 m).[53] This correction will be made in the table. GTE further notes that the entry under the column labeled "Wiring Crossing Alternatives" should read "See Wire Separation – Section 68.213(d)(7)," rather than "See Wiring Separations," as proposed. GTE Comments at 13. Because the entry refers to Section 68.213(d)(7) which is

[51] We noted in the Second Notice that although these separation requirements are incorporated by reference (to electrical codes) into Section 68.215(d), they are basic to the proper performance of telephone wiring and should be published specifically in Section 68.213(d). 92 FCC 2d at 21-22.

[52] Because a Section 68.213(c) was unnecessary in light of our decision not to impose any special qualifications on installers of non-system wiring, we will adopt the material requirements as Section 68.213(c).

[53] AT&T Comments, Appendix at 17; UTS Comments at 8; REA Comments at 3; GTE Comments at 13.

captioned, "Wire Separation," we believe it is helpful to identify it as such in the separations table. We will therefore make this change.[54]

71. UTS proposes to include a statement regarding the connections made to vacant COPW conductors.[55] UTS suggests that installers be cautioned that while COPW may contain signals and voltages other than for network communications service, other relevant sections of Part 68 apply. UTS Comments at 7-8. We agree that it is important to ensure that untrained installers are aware that using COPW conductors for other than network communications purposes may cause network or safety problems. While proposed Section 68.213(d)(5)("Limitations on Electrical Signals") already contains a warning to this effect, we believe that subscribers would benefit from a simpler warning, as the untrained may not understand the technical language and references in the proposed rule. We will therefore include the following in the guidelines for simple installations:

> Wiring conductors should not be used for other than network communications purposes. Routing any other voltage sources in wiring may result in improper functioning of the wiring or network harm.[56]

72. UTS argues that the simple installation guidelines should limit wire size to not finer than 26 gauge, and both UTS and USITA urge that the guidelines include a caution on length of wiring runs in relation to gauge. They assert that such rules are necessary to permit proper operation of the telephone circuit, especially if untrained subscribers are permitted to install wiring. UTS Comments at 8-9; USITA Comments at 5-6. GTE suggests that wire used for COPW should be limited to #22, #24 or, for flat wire, #26 awg. GTE Comments at 12-13. Because the chief benefit of including such a caution is to aid the untrained – especially those purchasing from bulk spools instead of pre-packaged wiring – we believe that any recommendations on wiring length as related to gauge are more appropriately included as guidelines in the simple installations bulletin rather than as material requirements. Although network integrity may be impaired if there is a proliferation of wiring runs exceeding

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[54] CCS asserts that the separations table should also warn against running telephone wire through holes containing electrical wires. CCS Comments at 6. This warning is already contained in the simple installations guidelines and therefore need not be repeated in the table.

[55] Electrical signals which are generated in equipment at the subscribers' premises, rather than from the local telephone company central office, are permitted to be routed in COPW provided that they are "non-hazardous voltage sources" meeting certain Part 68 requirements. For example, low voltage power supplies and security and alarm systems may be found in one and two-line business and residential telephone service.

[56] California suggests that the table of electrical current limitations in proposed Section 68.213(d)(5) has no application to one and two-line installations and should therefore be omitted. California Comments at 5. We note that the guidelines, as adopted, simplifies proposed Section 68.213(d)(5) and eliminates this table.

recommended lengths, the primary beneficiaries of such a recommendation are COPW installers because longer-than-recommended runs may not provide satisfactory performance. Similarly, utilizing non-standard ultrathin wire may create performance problems. Accordingly, we will include a provision to discourage the use of such wire generally. We will add the following to the simple installations guidelines:

> Wire runs should be limited to 250 feet for #22 awg wire, 200 feet for #24 awg wire, 100 feet for #26 awg wire, and 100 feet for flat wire. Longer runs may not provide satisfactory performance. Wire smaller in gauge than #26 awg should not be used.

73. With respect to material standards, the Second Notice proposed standards for non-system wire which are identical to those set out for system wire in Section 68.215(d)(2). Specifically, because inadequately insulated wire has the potential to cause severe harm to the network or to others on the network, insulated conductors are required to have a jacket or sheath with a 1500 Volt minimum breakdown rating. Because a covering jacket or sheath may not be necessary with two or four conductor wire, however, and such conductors, if individually insulated, may meet the specified insulation breakdown rating, we will not require a jacket or sheath to be used with one and two-line COPW. Rather, we will simply require conductors to have insulation that meets the 1500 Volt breakdown requirement. In addition to this requirement, AT&T proposes to include requirements that one and two-line COPW meet specified stress and longitudinal balance tests and consist of solid, annealed copper conductors insulated with polyvinyl chloride or an equivalent compound.[57] AT&T Comments, Appendix at 12-13. The bulk of one and two-line COPW will be unshielded wire, i.e. two or four conductors in a flat or round cable, requiring a complicated testing scheme that would involve bundled cable or ground plane test references. Even in the event of imbalance of such cable, the impact would be noise on the subscriber's telephone line, a customer problem analogous to noisy CPE. This is not a harm to the network under Section 68.3(g). Because an imbalance testing scheme is not readily implemented and because no harm is likely to be caused to the network if the COPW is imbalanced, we see no need to adopt these testing requirements. As for AT&T's proposed material requirements, it is not apparent why conductors must be copper or insulated with a polyvinyl chloride compound.[58] Compliance with the 1500 Volt insulation breakdown rating should be sufficient to ensure that the COPW is not likely to

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[57] AT&T also proposes that passive COPW components be required to meet longitudinal imbalance and electrical stress tests. As indicated in note 29 *supra*, we do not believe any such requirements are appropriate at this time.

[58] AT&T also suggests that the conductors should be insulated so as to assure that no greater than 10 milliamperes peak current flow, conductor-to-conductor. This standard is already contained in the rule containing the insulation breakdown rating requirement. We believe this standard relates to network harm. *See* Section 68.213(d)(1).

introduce harm to the network. Accordingly, we decline to adopt these additional material standards.

74. GTE also suggests additional material standards, including a requirement that the wire be commercially available and easily identifiable as telephone premises wire, that conductors be 22 or 24 gauge (or in the case of flat cable, at least 26 gauge), and that the conductor insulation use an industry accepted color code format. GTE Comments at 12-13. We believe, however, that packaging requirements, such as color coding and labelling, should not be implemented by this proceeding. *See* para. 80 *infra*. Further, the proposal to include requirements relating to gauge has been addressed in para. 72 *supra*.

75. Finally, UTS and GTE recommend that the material requirements mandate that one and two-line COPW have a minimum of three, and preferably four, conductors. Both parties reason that if the subscriber at a location served by one line decides to join a party line or add a second line to the premises, three or four conductors are needed. Because the "incremental cost of four-conductor station wire is minimal," they argue that this type of wire should be required to be installed initially. UTS Comments at 8-9; GTE Reply at 24-25. We believe that this proposal relates to subscriber convenience rather than to network integrity. Although we recognize that it might be beneficial to some subscribers to install four conductor cable, we see no reason to foreclose those subscribers who wish to install two conductor COPW from doing so. We therefore reject this proposal.

I. *Registration of One and Two-Line COPW*

76. The Second Notice also raised the issue of whether a registration program should be adopted for one and two-line COPW. We stated in the Second Notice that the rules for system wiring do not require registration, but require instead that documentation be provided to the telephone company by the installation supervisor demonstrating that the wiring will conform to the insulation requirements specified in Section 68.215(d)(2). This procedure was adopted because substandard system wire probably would not be used by those who were responsible for subsequent failures. We observed, however, that "inappropriate" cables are available in the marketplace (*e.g.*, "zipcord"-type appliance wire, speaker wire, thermostat wire, bell wire, etc.) that might be used by untrained subscribers for one and two-line COPW installations. There is also a possibility that substandard cables, though denoted "telephone wire," might be manufactured and broadly made available to subscribers through retail outlets. In view of these considerations, we proposed an abbreviated registration procedure directed towards assuring that non-system wiring conforms to a 1500 Volt breakdown rating. We further proposed to limit the wire

registration requirement to cables containing fewer than twenty-five pairs, reasoning that twenty-five pair or larger cables should have been designed for use in the system environment, which, as indicated, should be self-regulated for quality. 92 FCC 2d at 31. We invited comment on these proposals.

77. Both AT&T and GTE urge that a full registration program for wire used for non-system installations would be unnecessary and burdensome. AT&T suggests that simply requiring manufacturers to comply with Part 68 material standards and to declare in written form on the packaging that the wire meets these standards is sufficient. AT&T Comments at 27. GTE recommends that in lieu of registration the Commission should adopt industry standards by requiring use of wire that meets the Electronics Industries Association (EIA) performance specifications set out in PN-1558, "Premises Wiring for Voice Telephone Terminals." Additionally, GTE urges that the wire should be UL listed and specifically identified as telephone premises wire for one and two-line installations. GTE further states that if the Commission does not elect to use industry standards, it would favor an abbreviated registration program or a "verification" program requiring the wire manufacturer to attest that the wire complies with FCC technical requirements. GTE Comments at 11-12. The Insulated Cable Engineers Association (ICEA) notes in its comments that it is currently developing manufacturing standards for non-system premises wire, and requests that we defer any regulatory action until these standards are completed.[59] AT&T supports the development of industry standards for wire and suggests that EIA or ICEA standards would be appropriate. AT&T Reply at 18.

78. REA, on the other hand, supports a registration program and, as an additional safeguard, suggests that the wiring installer be required to provide documentation to the telephone company regarding the materials and means of connection. REA Comments at 3. UTS, although not explicitly supporting any particular registration procedure, urges that subscribers be required to provide the telephone company with the registration number of wire used in non-system installations. In addition, UTS submits that *all* unprotected premises wiring – including twenty-five pair cables – should be required to comply with specific industry standards and suggests that EIA standards should be incorporated by reference into our rules. UTS Comments at 6.

79. Although we agree with those commenters who urge that a full registration program is not warranted, we believe that some sort of assurance of telephone wire's quality and suitability is necessary. We are concerned that substandard cables specifically labelled as "telephone

[59] A draft of these standards, entitled "American National Standard for Telecommunications Wire and Cable for Premises Wiring," was submitted by ICEA.

wire" might be made broadly available to consumers once our non-system COPW program is adopted. This may create two problems unique to telephone wire. First, such wire is not UL listed and therefore is not offered to the public with any generally accepted guarantee of inherent quality.[60] Second, with regard to specific technical matters, faults in wire insulation could unreasonably increase the potential for harmful contact with premises electricity sources, which could cause damage to telephone company equipment or harm to telephone company personnel. In order to avoid these potential problems, we believe that a nonburdensome procedure to assure the distribution of wire safe for telephone network interconnection is warranted.

80. In implementing such a procedure, we seek to avoid imposing any unnecessary burden on wire manufacturers or others. A full, long-form registration program involving detailed testing by a qualified laboratory and submission of support data and samples to the FCC is overly burdensome, both on manufacturers and on the Commission, particularly in a market where only some half dozen manufacturers now exist.[61] *See* 47 C.F.R. Part 68, Subpart C. Our proposal in the Second Notice for an abbreviated registration program did not specify procedural requirements, although we intimated that a requirement for submission of data supporting conformance with the 1500 Volt breakdown rating currently contained in Section 68.215(d)(2) was under consideration. In view of the comments and our policy of minimizing regulatory oversight, we do not believe such a procedure is necessary. Instead, we will require wire manufacturers (or distributors or retailers, whichever name appears on the wire packaging in the marketplace) simply to attest, by letter, to the Commission that their non-system telephone wire meets Part 68 stan-

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[60] As of the date of adoption of this order, neither EIA nor ICEA standards have been finalized. Several commenters suggest that these industry-developed standards, when finalized, should be incorporated by reference into the Part 68 rules. We do not believe that this is necessary. The material standards already contained in the rules should be adequate to assure the quality of wire and prevent potential harm to the network. Further, if industry standards are incorporated by reference, a determination would have to be made as to which specific standards to incorporate, a formidable undertaking which we do not believe is warranted in light of the safeguards against potential network harm adopted herein. Of course, nothing in our order precludes wire manufacturers from complying with more stringent industry standards. Once industry standards are established, any party feeling that the standards we adopt here are unnecessarily stringent may utilize the appropriate regulatory procedures to seek a change.

[61] As suggested above, our concern is that widespread implementation of our non-system COPW program will produce an incentive for the retail distribution of low priced telephone wire by a myriad of suppliers. Thus, despite the current small number of manufacturers, we anticipate that the rules we adopt here will be needed in the expanded wire supply environment.

dards.[62] The Commission will from time to time publish by public notice a list of attestation registrants. Consumers choosing to perform non-system COPW operations will be required to contact their telephone company to report, among other things, the brand name or manufacturer and model number, if any, of the wire they have selected. *See* para. 59 *supra* and Section 68.213 of the rules. If the manufacturer of that wiring is not on the Commission's attestation list or is shown to be marketing wire that causes harm to the network, the telephone company may limit the subscriber's right to connect that wire to the network. *See* Section 68.213(g). Telephone companies, of course, will be expected to maintain an up-to-date list of approved wire. To ensure that consumers are readily able to identify suitable wire, we encourage manufacturers to indicate clearly on the packaging that the wire meets FCC standards.

81. In short, this attestation procedure is minimally burdensome on the industry and this Commission, yet it reasonably assures that the wire used for non-system wiring will not, of itself, cause harm to the network. Therefore, we will add the following as Section 68.213(d):

> *Attestation*: Manufacturers (or distributors or retailers, whichever name appears on the packaging) of one and two-line non-system telephone premises wire shall attest in a letter to the Commission that the wire conforms with Part 68, FCC rules.

If in the future, however, a showing can be made that the industry has become self-regulated for quality, we are prepared to revisit these matters.

J. *Instructions*

82. The Second Notice indicated that if we were to require registration of one and two-line non-system wire, the registrant, like other registrants, would be subject to the requirement of Section 68.218(b)(1) to provide installation instructions with the wire. 92 FCC 2d at 31. No party opposes such a requirement, and AT&T and GTE emphasize the advisability of providing instructions to untrained installers of non-system COPW. AT&T Comments at 27; GTE Comments at 9-10. California's position that no special qualifications should be imposed on non-system installers rests partially on its belief installation instructions are readily available from wire manufacturers and local telephone companies. California Comments at 4.

83. We agree that it would be desirable to make installation instructions available to all persons purchasing non-system telephone wire. Our informational bulletin will to a large degree provide this information. In

[62] Attestation letters should be submitted to the Secretary of the Commission, 1919 M Street, N.W., Washington, D.C. 20554. For the reasons discussed in the Second Notice and in para. 76 *supra*, we will not subject twenty-five pair (or greater) cable to this attestation procedure. *See* Second Notice at para. 80.

light of this and in order to minimize regulatory intervention, however, we will not impose a requirement that manufacturers make installation instructions available with their wire. Indeed, because untrained installers will tend to make their wire purchase decisions based, in part, on the availability of this relevant information, it would appear that wire manufacturers have an incentive to include installation information with their products where practicable. For their part, telephone companies, in order to preserve the integrity of their network, would benefit by disseminating such information to their subscribers, perhaps as a billing insert and/or in their "white pages."[63] We encourage wire manufacturers, distributers and retailers, as well as telephone companies, to cooperate in this regard.[64] As an example of this kind of cooperation, we note that GTE telephone companies provide pamphlets containing installation instructions for non-system COPW and provide assistance if their subscribers encounter unexpected problems in installation (where state programs apply). GTE Comments at 9-10. We suggest that the guidelines and warnings in our instructional bulletin, the notification requirement of Section 68.213(e), and the testing requirements of Section 68.213(f) together serve as a model for any installation instructions.

K. *Extraordinary Procedures*

84. In the Second Notice, we proposed that the existing extraordinary telephone company procedures of Section 68.215(g) should be applied equally to non-system COPW. These procedures provide, in short, that the telephone company may, as an exceptional remedial measure, inspect the wiring during or after placement and may require the use of a protective apparatus. We observed that these procedures take on increased importance if no special qualifications are required for non-system installers. 92 FCC 2d at 23. No comments were received on this issue. We therefore adopt the rule as proposed. Changes in wording, however, are necessary to make the rule consistent with out program for non-system COPW.[65] We have incorporated these changes in the rule. *See* Appendix.

V. *CONCLUSION AND ORDERING CLAUSES*

85. The inclusion of one and two-line non-system premises wiring in Part 68 will expand the scope of Part 68 so that new customer premises

[63] Some telephone companies already provide installation instructions for terminal equipment in their "white pages."

[64] We note that this does not preclude state regulatory authorities from disseminating additional instructional material or requiring local telephone companies to disseminate this information to their subscribers.

[65] For example, Section 68.215(g) speaks in terms of information provided in the "supervisor's affidavit," language which is not applicable to the non-system COPW program.

wiring activities may be performed by subscribers themselves. We believe that the standards adopted for one and two-line non-system COPW will assure that this end is reached without creating the potential for harm to the network. In addition, we believe that the definition of demarcation point adopted herein provides a workable and flexible solution to the problem of determining where the network ends and COPW begins.

86. For purposes of Regulatory Flexibility Act, 5 U.S.C. § 604, the Commission certifies that this report and order will not have a substantial economic impact on a significant number of entities. There are presently only some half dozen manufacturers of non-system telephone premises wiring, all of whom are producing quality wire. In addition, the report and order simply requires manufacturers to attest by letter that their wire meets FCC requirements.

87. Accordingly, IT IS ORDERED, pursuant to 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 220, 313, 403, 412, and 5 U.S.C. § 553, that Part 68 of the Commission's Rules and Regulations, 47 C.F.R. § 68.1, *et seq.*, is amended as set forth in the attached appendix to be effective 90 days after this *Report and Order* is published in the Federal Register.

88. IT IS FURTHER ORDERED, that the Secretary shall cause a copy of this *Report and Order* to be served on the state Commissions.

89. IT IS FURTHER ORDERED, that Docket 81-216 IS TERMINATED with regard to the issues addressed herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Part 68 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations, Part 68) is amended as follows:

1. By revising Section 68.1 to read as follows:

Section 68.1. Purpose.

> The purpose of the rules and regulations in this part is to provide for uniform standards for the protection of the telephone network from harms caused by the connection of terminal equipment and associated wiring thereto, and for the compatibility of hearing aids and telephones so as to ensure that persons with hearing aids have reasonable access to the telephone network.

2. By adding the following to Section 68.2:

Section 68.2. Scope.

(a)(4) *Of all customer premises wiring associated with one and two-line (non-system) residential and business telephone service.*

3. By amending Section 68.3(h) to read as follows:[1]

Network Interface or Demarcation Point: The point of interconnection between telephone company communications facilities and terminal equipment, protective apparatus or wiring at a subscriber's premises. The network interface or demarcation point shall be located on the subscriber's side of the telephone company's protector, or the equivalent thereof in cases where a protector is not employed, as provided under the local telephone company's reasonable and nondiscriminatory standard operating practices.

4. By adding the following to Section 68.3:

Non-System Premises Wiring: Wiring which is used with one and two-line business and residence services, located at the subscriber's premises.

(1) Fully Protected Non-System Premises Wiring. Non-system premises wiring which is electrically behind registered (or grandfathered) equipment or protective circuitry which assures that electrical contact between the wiring and commercial power wiring or earth ground will not result in hazardous voltages at the telephone network interface.

(2) Unprotected Non-System Premises Wiring: All other non-system premises wiring.

5. By amending the captions of Section 68.3(t) to read as follows:

System Premises Wiring:

(1) Fully Protected System Premises Wiring.

(2) Protected System Premises Wiring Requiring Acceptance Testing for Imbalance.

(3) Unprotected System Premises Wiring.

6. By adding a new Section 68.213 as follows:

Section 68.213. *Installation of other than "fully protected" non-system premises wiring.*

(a) *Scope of this rule.* Provisions of this rule are limited to "unprotected" premises wiring used with simple installations of wiring for one and two-line residential and business telephone service. More complex installations of wiring for multiple line services, for use with systems such as PBX and telephone systems, are controlled by Section 68.215 of these rules.

(b) *Wiring authorized.* "Unprotected" premises wiring (wiring which is not located electrically behind apparatus which protects against hazardous voltages and imbalance) may be used to connect units of terminal equipment or protective circuitry to one another, and to the network interface (or demarcation point), if installed in accordance with these rules. Subsequent relocation of a demarcation point may be arranged, either at the subscriber's request or on the serving telephone company's initiative, but the serving telephone company shall not discriminate in its treatment of demarcation point location, or relocation. Responsibility for the protector (and its associated grounding) or the network side of the demarcation point rests with the telephone company, though the subscriber is responsible for consequences resulting from erroneous wiring procedures conducted under his or her direction. Responsibility for wiring on the subscriber's side o

[1] The reference letters assigned to various definitions in Section 68.3 will be reassigned t reflect changes in alphabetical order.

the demarcation point (including any protector that may be installed as part of the premises wiring) purchased in-place or wholly or partially new, rests with the owner (or subsequent owner) of the wiring.

(c) *Material requirements.* Conductors shall have insulation with a 1500 Volt rms breakdown rating. This rating shall be established by covering the jacket or sheath with at least six inches (measured linearly in the cable) of conductive foil, and establishing a potential difference between the foil and all of the individual conductors connected together, such potential difference gradually increased over a 30 second time period to 1500 Volts rms, 60 Hertz, then applied continuously for one minute. At no time during this 90 second time interval shall the current between these points exceed 10 milliamperes peak.

(d) *Attestation.* Manufacturers (or distributors or retailers, whichever name appears on the packaging) of non-system telephone premises wire shall attest in a letter to the Commission that the wire conforms with Part 68, FCC Rules.

(e) *Notice to the telephone company.* The subscriber shall notify the local telephone company in advance of each operation associated with the installation, connection, reconfiguration and removal (other than removal by disconnection at a standard jack) of premises wiring to or from the telephone network. The following information shall be provided:

(1) The responsible subscriber's telephone number(s).

(2) A description of the location of the jack to which the premises wiring is to be connected.

(3) A statement that all applicable rules, building codes and electrical codes will be complied with.

(4) The wire manufacturer, or brand name, and model number, if any, of the wire used.

(f) *Acceptance testing.* Non-system premises wiring installed in accordance with these rules shall be tested under the acceptance tests specified in this subsection whenever an operation associated with any installation, reconfiguration or removal of wiring (other than final removal) is performed. A telephone which responds to ringing shall be used to perform the tests when the CPE connected or to be connected to the premises wiring does not itself provide ringing.

(1) *Dial Tone Testing.* A telephone connected with the line(s) shall be used to perform this test in the following order:

(i) Lift the handset of the telephone to create the off-hook state on the line under test.

(ii) Listen for noise. Confirm that there is neither audible hum nor excessive noise.

(iii) Listen for dial tone. Confirm that dial tone is present.

(iv) Break the dial tone by dialing a digit. Confirm that dial tone is broken as a result of dialing the digit.

(v) With dial tone broken, listen for audible hum or excessive noise, which could indicate a faulty connection. Confirm that there is neither audible hum nor excessive noise.

(2) *"Ringback" testing.* A telephone connected to the subscriber's line(s) shall be used as follows:

(i) Make a "ringback" call (obtain from the local telephone company information on how to make "ringback" test calls), or have another person dial the number of the line being tested.

(ii) Permit the telephone to ring for one minute (usually twelve rings).

(iii) Lift the handset off the telephone for five seconds or longer, as necessary.

(iv) Hang up. Check return of normal dial tone.

(3) *Failure of acceptance tests.* Absence of dial tone before dialing or inability to break dial tone during either test indicates failure of premises wiring. Failure to receive ringing during the "ringback" testing may indicate failure either of the wiring or of the ringer in the telephone; if necessary, substitute a telephone which is known to be operating to determine which is at fault. Upon any failure, the failing equipment or portion of the premises wiring shall be disconnected from the telephone network, and may not be reconnected until the cause of the failure has been isolated and removed. Any previously tested line(s) shall be retested if it was in any way involved in the isolation and removal of the cause of the failure.

(g) *Extraordinary procedures.* The local telephone company is hereby authorized to limit the subscriber's right of connecting one and two-line non-system premises wiring.

(1) *Conditions which may invoke these procedures.* The extraordinary procedures authorized herein may only be invoked where one or more of the following conditions is present:

(i) Information provided by the subscriber gives reason to believe that a violation of Part 68 of the FCC's Rules is likely.

(ii) A failure has occurred during acceptance testing.

(iii) Harm has occurred, and there is reason to believe that this harm was a result of wiring operations performed under this section.

The extraordinary procedures authorized in the following subsections shall not be used so as to discriminate between installations by local telephone company personnel and installations by others. In general, this would require that any charges for these procedures be levied in accordance with, or analogous to, the "maintenance of service" tariff provisions: if the installation proves satisfactory, no charge should be levied.

(2) *Monitoring or participation in acceptance testing.* Notwithstanding the previous subsection, the local telephone company may monitor or participate in acceptance testing at the time of the initial installation of wiring in the absence of the conditions listed therein; at any other time, one or more of the listed conditions shall be present. Such monitoring or participation in acceptance testing should be performed from the central office test desk where possible to minimize costs.

(3) *Inspection.* Subject to paragraph (g)(1) of this section, the local telephone company may inspect wiring installed pursuant to this section. To minimize disruption of the premises communications system, we are limiting the right of inspecting wiring as follows:

(i) During initial installation of wiring: The telephone company may require withdrawal of up to 5 percent (measured linearly) of wiring run concealed in ducts, conduit or wall spaces, to determine conformance of the wiring to the information furnished by the subscriber.

(ii) After failure of acceptance testing or after harm has resulted from installed wiring: The telephone company may require withdrawal of all wiring run concealed in ducts, conduit or wall spaces which reasonably could have caused the failure of harm, to determine conformance of the wiring to the information provided by the subscriber .

(4) *Requiring the use of protective apparatus.* In the event that any of the conditions listed in paragraph (g)(1) of this section, arises, and is not permanently remedied within a reasonable period, the telephone company may require the use of protective apparatus which protects against hazardous voltages. Such apparatus may be furnished either by the telephone company or by the subscriber. This right is in addition to the telephone company's rights under § 68.108.

(5) *Notice of the right to bring a complaint.* In any case where the telephone company invokes the extraordinary procedures of § 68.213(g), it shall afford the subscriber the opportunity to correct the situation which gave rise to invoking these procedures, and inform the subscriber of the right to bring a complaint to the Commission pursuant to the procedures set forth in Subpart E of this part. On complaint, the Commission reserves the right to perform any of the inspections authorized under this section, and to require the performance of acceptance tests.

7. By amending the caption of Section 68.215 to read as follows:

Section 68.215. *Installation of other than "fully protected" system premises wiring.*

Anti-Trust, Effect on Character
Mobile Radio Service, Authorization
Renewal, Applicant v. New Applicant
Service Need for

In first comparative renewal case in mobile radio common carrier service, Review Board affirmed ALJ's grant to incumbent licensee as the better comparative applicant on traditional comparative factors. Competitor's comparative showing was flawed by its failure to make a need showing.
—*Baker Protective Services, Inc.*
CC Docket No. 80-185

FCC 84R-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BAKER PROTECTIVE SERVICES, INC.	
For renewal of licenses of Station KIA956 operating on frequency 152.15 MHz and Station KSD312 operating on frequency 454.35 MHz in the Domestic Public Land Mobile Radio Service at Miami, Florida and Chicago, Illinois	CC Docket No. 80-185 File No. 25288-C2-R-74
For consent to transfer of control of station licenses KIA956 and KSD312 from the Stockholders of Baker Industries, Inc., Transferors, to BWA Corporation, Transferee, operating in the Domestic Public Land Mobile Radio Service at Miami, Florida and Chicago, Illinois	CC Docket No. 80-186 File No. 20894-CD-TC-(2)-78
AIR-BEEP OF FLORIDA, INC.	CC Docket No. 80-187 File No. 21392-C2-P-74

For a construction permit to establish a new two-way station on frequency 152.15 MHz in the Domestic Public Land Mobile Radio Service at Miami, Florida

TEL-CAR CORPORATION

CC Docket No. 80-188 File No. 21389-C2-P-74

For a construction permit to establish a new two-way station on frequency 152.15 MHz in the Domestic Public Land Mobile Radio Service at Miami, Florida

Appearances

Arthur Blooston, Harvey J. Shulman, E. William Henry, and *Linda B. Blair* on behalf of Baker Protective Services, Inc.; *Jerome S. Boros,* on behalf of Air-Beep of Florida, Inc.; *Jacob W. Mayer* and *James O. Juntilla* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

Adopted: April 23, 1984; Released: May 3, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL BOARD CHAIRMAN MARINO:

1. This is the first comparative renewal case in the mobile radio common carrier service, part of the telephone industry which the Commission first opened to competition in the late 1940's and which today could be considerably expanded by the new "cellular" radio technology. *See GTE-Telenet Merger Case,* 72 FCC 2d 91, at 94 n.3 (1979). The contested radio facilities in this case will be used to provide mobile two-way telephone and paging services to Miami, Florida. After a full trial type hearing Acting Chief Administrative Law Judge Fitzpatrick issued a 66-page Initial Decision, FCC 83D-50, August 23, 1983, which found that Baker Protective Services, Inc., (Baker Services) the incumbent licensee, was basically qualified, and the best comparative applicant on those traditional factors which have been utilized in past mobile cases. See authorities in I.D. notes 110-112. Air-Beep of Florida, the unsuccessful applicant, filed a brief and exceptions, and oral argument was held on February 16, 1984, after several rounds of motions to reopen the record.[1]

[1] No exceptions to the Initial Decision were filed by Tel-Car Corporation. Therefore, its application will be dismissed with prejudice for failure to prosecute, pursuant to Section 1.276(f) of the Commissions Rules, 47 CFR 1.276(f).

In essence, the Board agrees with the Common Carrier Bureau that the meticulous findings in the Initial Decision are supported by the record; that the ALJ's conclusions granting Baker Services' applications flow from controlling legal precedent; and that Air-Beep's comparative showing is fatally flawed by its failure to even try to demonstrate a need for its specialized common carrier service. See para. 22 below.

2. *General Background and ALJ's Conclusions*: The procedural history of this case is accurately set out in the Initial Decision, *I.D.*, at paras. 1-9. It reveals that seven issues were originally set for hearing and that two prehearing conferences and seven days of hearing sessions were held in Miami, Florida and Washington, D.C. *Id.* at 4-7. Later, when the ALJ added two new issues to the case, two further prehearing conferences and two more hearing sessions were held in Washington, D.C. *Id.* 8-9. Detailed findings of fact were made by the ALJ on all nine issues, *id,* 10-126.

3. On the comparative aspect of the case, the ALJ first concluded that the doctrine of "legitimate" renewal expectancies which has been evolved in broadcast comparative renewal cases, but never been applied to mobile cases, would not be applied in this case. *Id.* Conclusions 18 n. 108.

4. Applying the traditional factors which had been developed in non-renewal mobile comparative cases, the ALJ assessed Air-Beep a substantial demerit because it did not even attempt to show that a need exists for its proposed service. He noted that unlike broadcasting where the public need can be presumed because service is available to the general public, the Commission does not presume need in the mobile radio common carrier service because licensees provide "a specialized [common carrier] service to a limited number of private users who must pay a fee for such service." *Id,* 20-21. Air-Beep was also awarded a slight preference for proposing to integrate its principals into management at the proposed facilities. *Id,* 33.

5. Baker Protective Services, on the other hand, was awarded "a substantial comparative preference relative to the need showing of the applicants" because it had shown satisfactory utilization of its existing radio facilities, submitted a traffic load study, and demonstrated additional need for its proposed service. *Id,* 30. Baker also received two slight preferences for developing written regulations governing its relationships with its subscribers and for its "policy of providing unlimited service, at a charge, to transient subscribers" who are traveling in the Miami area. *Id.* 35, and 36.

6. Finally, Baker was awarded a "moderate" preference on the preservation of competition comparative factor, I.D. concl. 37; that is, Air-Beep is already a licensee of mobile and paging radio facilities in the Miami area (I.D. Findings, para. 151) and a grant to Baker would preserve

the existing level of competition in that market. Balancing all of the comparative factors which had been awarded, the ALJ concluded that Baker's substantial preference as to "need," moderate preference for preservation of competition, and slight preferences for establishing service regulations and provision of transient service "clearly outweigh" the slight preference awarded Air-Beep for participation of ownership in management of the proposed mobile radio facilities, *Id.* 39.

7. Four basic qualification issues were also specified against Baker Services. These issues grew out of antitrust violations by Wells Fargo Armored Service Corporation, which in the past had been affiliated with Baker Services by virtue of a common parent company, *id.* 2-4, and Borg-Warner which had recently acquired control of Baker and its parent companies. *Id.* 12-15. Related issues concerned the failure to report timely and fully the Wells Fargo antitrust violations, and an unauthorized transfer of control based on the acquisition of Baker *via* the parent companies by Borg-Warner without prior Commission approval. Based on his detailed finding of fact, 10-108, the ALJ drew the following conclusions on these issues.

8. The Wells Fargo antitrust misconduct concerned solely the armored car service. That conduct was confined to Wells Fargo, occurred several years ago (1968-1975), and has not reoccurred; neither Baker nor its parent had any involvement in that misconduct. The ALJ concluded that those violations of law did not reflect on the basic qualifications of the licensee. *I.D.* Concl. 4. Nor did it form the basis for predicting that the licensee would not comply with Commission rules or policies in the future. *Id.* 5. Moreover, Baker's failure to report the Wells Fargo antitrust matter was found to be "an error in judgment and not the result of bad faith or deliberate deception" warranting no sanction. *Id.* 6-11.

9. Borg-Warner acquired Baker, and its parent, in December 1977. Prior to that time, two other companies controlled by Borg-Warner had violated the antitrust laws in the manufacturing and sale of plumbing fixtures and plastic pipe fitting between 1962 and 1971. Based on his detailed findings, 80-108, the ALJ concluded that no person involved in "top management" of Borg Warner was involved in those antitrust violations; *id.* Conclusion 12, nor was any past or present principal of Baker Services involved in that misconduct. Accordingly, that misconduct which occurred more than ten to twenty years ago was held to have no bearing on basic or comparative qualifications. *Id.* 13.

10. An unauthorized transfer of control of Baker's radio facilities was found to have occurred (I.D. 57-84) despite "efforts of Borg-Warner to avoid such an incident," and the ALJ concluded that the then general counsel of Baker's parent company

must be faulted for not having realized the need to seek prior Commission consent for the transfer of control. . . [T]his failure was inadvertent and attributable to the fact that the Miami and Chicago mobile facilities accounted for a relatively small fraction of [Baker's parent's] business. When it became known that prior Commission consent was required, the matter of the unauthorized transfer of control was voluntarily reported to the Commission. The facts do not reflect upon qualifications. . . to be a Commission licensee. Where the violation was inadvertent, there was no intent to ignore Commission requirements and the matter was voluntarily reported to the Commission in a reasonably timely manner, the assessment of a comparative demerit is not warranted. *Merrimack Valley Broadcasting, Inc., 92* FCC 2d *506*; 52 RR 2d 1210, at 1219-1220 (Rev. Bd. 1982) (I.D. 15)

DISCUSSION

11. Our review of the record and arguments establishes that unless Baker is disqualified there is no doubt that Baker is the best comparative applicant. Thus, the bulk of Air-Beep's brief, and its petitions to reopen the record, are designed to support its contention that "Baker should be disqualified or comparatively decisively demerited." Br. 5-40. It devotes a few pages to the comparative qualifications of the applicants, Br. 40-44, and it notes in passing that it did not have to engage in an "idle act" of introducing "superfluous evidence" of the need for its proposed service because its proposed radio facilities encompass all of the area served by Baker and if there is a need for Baker's service there must be a need for Air-Beep's service. (Br. 41)

12. On the question of public need which is a pivotal comparative factor in this case, the ALJ properly assessed a substantial comparative demerit against Air-Beep because of that applicant's failure to submit such a showing. *Cf. Washington Mobile Telephone Co.*, FCC 83R-95, released November 18, 1983. Air-Beep was placed on notice by the hearing order that "comparative need" was an issue in this case, and it is crucial from the point of view of the Miami public that Air-Beep proposes to replace Baker's manual service with an automatic service, and that automatic service is presently more available in the Miami area than the scarcer manual service. Bureau Reply 4-5. We therefore affirm the ALJ's conclusions about the comparative importance of this factor.

13. In considering Air-Beep's argument that Baker should be disqualified because of the past antitrust violations, the Board, like the ALJ before us, must be guided by controlling policy set forth by the Commission more than thirty years ago in *Uniform Policy on Violations of Laws*, 42 FCC 2d 399 (1951) and recently applied in *RKO General, Inc.*, 78 FCC 2d 1, 47 RR 2d 399 (1980), *affirmed in part*, 670 F.2d 215, 50 RR 2d 821 (D.C. Cir. 1981). Past misconduct is relevant to the extent that "predictive judgment" can be made about future communications performance. Relevant considerations include: the nature of the misconduct, and whether it was communications related, the frequency of the misconduct,

the currency of the misconduct and the relationship of the wrong doer to the applicant. Once a past violation of law is established, Commission policy requires us to shift our focus and predict or forecast from the past violations whether the applicant can be relied upon to comply with FCC regulatory laws and policies in its licensed operations. *See, e.g., RKO General, Inc.*, 78 FCC 2d 26, 47 RR 2d at 942; *Central Texas Broadcasting Co.*, 90 FCC 2d 583, qualified FCC 83-415, released September 21, 1983. A radio licensee's past performance is the best indicium of future operations. *Cf. Citizen Communications Center* v. *FCC*, 447 F. 2d 1201, 1208 (D.C. Cir. 1971); *Radio Station WBAZ, Inc.*, 90 FCC 2d 818 (1982); *Alan K. Levin*, FCC 84R-18, released March 15, 1984.

14. As correctly pointed out by the ALJ, the Wells Fargo antitrust misconduct took place in the armored car service market, an industry which is unrelated to communications. This misconduct occurred almost a decade ago (1968 and 1975) and has not reoccurred. Wells Fargo is only a distant corporate "cousin" of Baker Services, and the two corporations have not conducted any joint operations or business activities. None of the persons involved in the misconduct at Wells Fargo had any relationship with Baker Services except one individual – Leidgen – who was vice president of Baker's parent company from April 1968 to December 1969. But this was a ceremonial position, the individual had no responsibility with respect to the operation of Baker Services, and that individual severed all connection in 1974. (*I.D.* find. 23-37).

15. Air-Beep argues (Br. 29-31) somewhat inconsistently that Baker's top officials must have been involved in the Wells Fargo misconduct; that, in any event, they subsequently condoned or endorsed that misconduct; and that corporate lines were so blurred that the misconduct should be imputed to Baker Protective Services. We agree with the ALJ, however, that Air Beep failed to produce any credible evidence to support these arguments. (I.D. Conc. 3-4). Air-Beep had the opportunity to cross-examine top officials from both Baker's parent company and Wells Fargo, but failed to support its theory. In the absence of probative evidence, Air-Beep's contentions must fail.

16. Two companies controlled by Borg-Warner violated the antitrust laws in the plumbing fixtures and pipefittings market ten to twenty years ago. That industry is not related to communications, and at the time of the violations neither the wrongdoing companies, nor their parent, Borg-Warner, were in any way related to Baker Services. Borg-Warner, which Air-Beep now calls Baker's grandparent, did not acquire Baker and its parent until 1978. None of Borg-Warner's top management was involved in that antitrust misconduct; nor did any person affiliated with Baker Services either in the past or at the present time have any connection with

the antitrust misconduct which occurred in the early 1960s and 1971. (*I.D.* Conc. 12-13)

17. On this point, Air-Beep takes a different tack arguing that the finding that top Borg-Warner officials were not involved is based only on hearsay evidence. (Br. 26-29) Air-Beep claims that the testimony by Borg-Warner's inhouse counsel, which was based upon his participation in overseeing and coordinating the defense of the antitrust suits, his investigation of the circumstances surrounding those suits, and his briefing and debriefing witnesses who appeared before the grand jury, was mere hearsay.[2] We need not reach this argument, however, or Baker's rebuttal, Reply 13 note 14, that this type of testimony satisfies an exception to the hearsay rule because of "circumstantial guarantees of trustworthiness," citing Fed. Rules Evid. 803(24). Rather, the findings concerning Borg-Warner's top officials' non-involvement in the antitrust violation also rest upon the testimony of Borg-Warner's corporate secretary, who testified based upon his own personal knowledge of what occurred at the Board of Directors meetings. These two witnesses, as well as a third witness, were cross-examined by Air Beep and the Common Carrier Bureau. And, Air-Beep did not subpoena any other witnesses, or documents even though numerous hearing sessions were held in both Washington and Miami. *Cf. Richardson* v. *Pearles*, 402 U.S. 389, 402 (1971). Thus, the ALJ's findings, 85-108, rest on substantial probative evidence and are not undermined by Air-Beep's procedural sniping.

18. In essence, Air-Beep asks us to visit the ancient sins of the grandfather which occurred prior to its affiliation with the radio licensee subsidiary and the similarly very old faults of a distant corporate cousin on the uninvolved radio licensee. Factually, these past faults are too remote in time and circumstances to afford a reasonable basis on which to predict the licensee's future conduct. Moreover, Baker has cited several Commission cases where even the involvement of top management was not imputed to the subsidiary licensee which was not involved in the misconduct. Reply Br. 7-8, citing *Westinghouse Broadcasting Co.*, 22 RR 1023 (1962); *Kaiser Broadcasting Co.*, 40 FCC 2d 589 (1974); and *Cox Broadcasting Co.*, 78 FCC 2d 684 (1980). This legal argument is persuasive here because the Court has recently indicated that, as a matter of administrative due process, the Commission could not depart from corporate misconduct precedents "without first serving notice that its

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[2] In *Gaco Communications Corp.*, 54 RR 3d 77, at note 15 (1983), this Board noted that "hearsay evidence is not necessarily precluded in administrative proceedings. *National Ass'n of Recycling Industries* v. *FMC*, 658 F.2d 816, 825 (D.C. Cir 1980); *see generally* K. Davis, *Administrative Law of the Seventies*, § 14.00, at 338 (*citing* FCC Rule § 1.351 which allows for relaxation of the Federal Rules of Evidence); § 14.11, at 340 (1976). *But see United Broadcasting Corp.*, 53 RR 2d 57, 80 n.114 (1983) (hearing exhibits relating to financial showing properly rejected by ALJ as hearsay)."

policy had changed." *RKO General, Inc.* v. *FCC*, 670 F.2d at 227. See also *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1002 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.*, v. *FCC*, 683 F.2d 503, 508 note 29 (D.C. Cir. 1982) (comparative case in which mail fraud conviction of one subsidiary was not attributed to subsidiary licensee). In sum, we concur with the ALJ's assessment that the antitrust violations have no effect on Baker's basic and comparative qualifications.

19. Two issues did more directly involve FCC regulations: (1) the failure to report timely and fully the Wells Fargo misconduct, and (2) the unauthorized transfer of control to Borg-Warner, which also grew out of a failure to report timely to the Commission. Air-Beep tries to puff these matters into "reckless" or deliberate attempts to deceive. But, the more reasonable explanation which emerges from our review of the Initial Decision and the record is that because of several layers of unintegrated corporations, and changes in corporate ownership and personnel over many years, inadvertent errors did occur in reporting some facts to the Commission. When those errors were discovered they were promptly brought to the attention of the Commission. *See Millard Orick*, 89 FCC 2d 571, 51 RR 2d 166 (Rev. Bd. 1982) and para. 22 below.

20. Finally, three different petitions have been filed with the Board seeking to enlarge the issues and to reopen the record for further hearings. The first two petitions rest upon recent actions taken in a proceeding pending against Borg-Warner at the Federal Trade Commission that allegedly was not timely reported by Baker Services. Neither petition warrants an issue. Such petitions will only be considered fully on the merits if they raise a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of their untimely filing. *See* 47 CFR 1.229(c). *Also see KFPW Broadcasting Co.*, 44 FCC 2d 310, 28 RR 2d 1644, (1973) (to support reopening the record, petitioner must show that it could not with due diligence have known or discovered such facts at the time of the hearing.) Here, as the Common Carrier Bureau correctly pointed out in its opposition filed September 7, 1983, Baker in fact had reported the pendency of that proceeding on August 11, 1980, not only to the FCC but to the parties including Air-Beep. Thus, Air-Beep's belated request not only fails to raise any question of probable decisional significance but also violates the Court's basic observation that a litigant cannot be allowed "to sit back and hope that a decision will be in its favor, and then when it isn't, parry with an offer of more evidence. No judging process in any branch of government could operate efficiently and accurately if such a procedure were allowed." *Colorado Radio Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

21. Air-Beep's latest petition to reopen is based upon a statement filed by Baker on January 4, 1984, reporting the pendency of a complaint filed on July 23, 1981, by the FTC against Echlin Manufacturing and Borg-Warner charging a violation of the anti-trust laws in the "automotive after market." In responses filed January 30 and February 8, 1984, the Common Carrier Bureau agreed with Baker that as general matter the Commission's application form did not require the reporting of the pendency of such action, nor was the pendency of that proceeding a matter of decisional significance. However, because of the background of this case, para. 19 above, the Bureau properly insisted on complete disclosure of all facts to insure that there had been no attempt to conceal this matter from the Commission. On February 14, 1984, Baker filed a full response containing the affidavits from all relevant sources explaining why this matter had not been reported to the Commission at any earlier point in the case. After reviewing all of the pleadings, and inquiring at the oral argument, the Board agrees with the Bureau (Tr. 1817) that there has been no showing either of "an intent to conceal" or "a pattern of carelessness or inattentiveness" requiring a further hearing. *Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23 (1983); nor do we discern any pattern of indifference to the antitrust laws.

SUMMATION

22. We have affirmed the ALJ's resolution of the antitrust issues as firmly supported by the factual record and controlling Commission and Court precedent, para. 18. On the reporting errors, para. 19, even if we were to award a significant demerit it would not be sufficient to overcome Baker's clear comparative superiority. Baker is substantially superior on those traditional comparative factors, see paras. 5-6 above, which most directly bear upon providing service to the Miami public. Moreover, the record reveals that unlike Air-Beep and its principals, who in the past have confined their operations to the more lucrative paging service, *I.D.*, finds. 155-159, Baker offers its Miami subscribers a broad choice of manual twoway service, automatic tone-plus-voice paging, and manual message relay. Thus, Air-Beep's failure to make a public need showing takes on added significance because of the possible withdrawal or disruption of service to existing mobile radio subscribers and users in the Miami area. A grant of Baker's applications will therefore best serve the public interest.

23. Relying on the Commission's *Cowles* decision, *supra*, 86 FCC 2d 993, both the Common Carrier Bureau and Baker urged the ALJ to award a "renewal expectancy" preference. As a general proposition we agree that such a consideration should be relevant in the mobile carrier service where the subscribing public has come to rely on their carrier for service and may have purchased thousands of dollars worth of equipment to

obtain the carrier's special service. The factors identified in *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970) as embodying the Communications Act's implicit renewal expectancies are equally applicable here. Thus, "expectancies are provided in order to promote security of tenure and to induce efforts and investments, furthering the public interest, that may not be devoted by a licensee without reasonable security." *Id.*, at 458. However, as the ALJ recognized, broadcast comparative renewal cases provide insufficient guidance in deciding what factors are to be considered in awarding this preference in mobile cases and the Board is without authority to prescribe policy. This is an expanding and very litigious industry; the Common Carrier Bureau, which urges consideration of a "renewal expectancy" in such cases, must first articulate the relevant factors which are to be considered in the future.

24. ACCORDINGLY, IT IS ORDERED, That the application of Tel-Car Corporation (File No. 21389-C2-P-74) IS DISMISSED, pursuant to Section 1.276(f) of the Commission's Rules for failure to file exceptions; that Air-Beep's petitions to enlarge issues and reopen the record, filed August 26, and December 8, 1983, and January 17, 1984, ARE DENIED; that Air-Beep's petitions for leave to amend filed August 25, September 22 and December 1, 1983 ARE GRANTED; that Air-Beep's petition for leave to file supplement, filed September 2, 1983 IS GRANTED; and that the motion for leave to file comments, filed February 15, 1984 by Baker Protective Services, Inc. IS GRANTED; and

25. IT IS FURTHER ORDERED that the applications of Baker Protective Service, Inc. for renewal of the license (File No. 25288-C2-R-74) for consent to transfer of control (File No. 20894-CD-TC-(2)-78) and for modification of the facilities of Station KIA 956, Miami, Florida, ARE GRANTED and the applications of Air-Beep of Florida, Inc. (File No. 21392-C2-P-74) IS DENIED, and that Baker's motion to strike filed December 9, 1983, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BAKER PROTECTIVE SERVICES, INC.	CC Docket No. 80-185 File No. 25288-C2-R-74
For renewal of licenses of Station KIA956 operating on frequency 152.15 MHz and Station KSD312 operating on frequency 454.35 MHz in the Domestic Public land Mobile Radio Service at Miami, Florida and Chicago, Illinois	
For consent to transfer of control of station licenses KIA956 and KSD312 from the Stockholders of Baker Industries, Inc., Transferors, to BWA Corporation, Transferee, operating in the Domestic Public Land Mobile Radio Service at Miami, Florida and Chicago, Illinois	CC Docket No. 80-186 File No. 20894-CD-TC-(2)-78
AIR-BEEP OF FLORIDA, INC.	CC Docket No. 80-187 File No. 21392-C2-P-74
For a construction permit to establish a new two-way station on frequency 152.15 MHz in the Domestic Public Land Mobile Radio Service at Miami, Florida	
TEL-CAR CORPORATION	CC Docket No. 80-188 File No. 21389-C2-P-74
For a construction permit to establish a new two-way station on frequency 152.15 MHz in the Domestic Public Land Mobile Radio Service at Miami, Florida	

Appearances

Arthur Blooston, Gerald J. Duffy, E. William Henry and *Lawrence P. Keller* on behalf of Baker Protective Services, Inc.; *John Borkowski, Jerome S. Boros, Irving Gastfreund* and *Zave M. Unger* on behalf of Air-Beep of Florida, Inc.; *Henry A. Solomon* on behalf of Tel-Car Corporation; and *Thomas Gutierez, Jacob W. Mayer* and *Stephen S. Melnikoff* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION
OF
ASSISTANCE CHIEF ADMINISTRATIVE LAW JUDGE
THOMAS B. FITZPATRICK

Issued: August 11, 1983; August 23, 1983

Preliminary Statement

1. On June 13, 1980, the Commission released its *Memorandum Opinion and Order*[1] in which it ordered a consolidated hearing on the application (File no. 25288-C2-R-74) for renewal of license of Station KIA 956 operating on 152.15 MHz at Miami, Florida, filed February 28, 1974, by Wells Fargo Armored Services Corporation of Florida[2], an application (File No. 21389-C2-P-74) for a construction permit for a new two-way station on 152.15 MHz at Miami, Florida, filed May 10, 1974, by Tel-Car Corporation (Tel-Car); an application (File No. 21392-C2-P-74) for a construction permit for a new two-way station on 152.15 MHz at Miami, Florida, filed May 10, 1974 (and refiled November 15, 1974), by Air-Beep of Florida, Inc. (Air-Beep).

2. On December 19, 1977, the Borg-Warner Corporation, through its indirect wholly-owned subsidiary BWA Corporation, acquired control of Baker Industries, Incorporated, BPS' parent[3]. On February 27, 1978, applications were filed with the Commission for consent to the transfer of control of BPS from the stockholders of Baker to BWA Corporation.[4] The applications were also designated for hearing.

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[1] *Baker Protective Services, Inc.*, 78 FCC 2d 373.

[2] The commission, on April 8, 1974, granted the application (File No. 21018-C2-AL-78) to assign the license of Station KIA 956 from Wells Fargo Armored Service of Florida, to Baker Protective Services, Inc. (BPS). BPS, which is a wholly owned subsidiary of Baker Industries, Inc. (Baker), is the applicant prosecuting the renewal application for Station KIA 956.

[3] BWA Corporation was a wholly-owned subsidiary of BWA Holding Corporation (now called Borg-Warner Investment Corporation) which in turn was a wholly-owned subsidiary of Borg-Warner Corporation.

[4] Baker Industries, Incorporated hereinafter is referred to as Baker or Baker Industries. In May, 1978, Baker was merged into BWA Corporation, which, as the surviving entity, changed its name to Baker.

3. Also involved in the present proceeding is the nonmutually exclusive application of Eagle Watch and Patrol Service, Inc. (Eagle), a subsidiary of BPS, for renewal of license of DPLMRS Station KSD 312, Chicago, Illinois. This application was initially filed by BPS on March 1, 1979. Subsequently, on April 12, 1979, the Commission granted its consent to the *pro forma* assignment of license of Station KSD 312 from BPS to Eagle (File No. 20947-CD-AL-79). This assignment was completed on May 1, 1979.

4. The applications were designated for a consolidated hearing on the following issues:

(a) to determine whether top management of Borg-Warner Corporation was involved in the conduct which led to the antitrust conviction and the nolo contendere plea concerning violations of the Sherman Antitrust Act which are set forth in the transfer of control application and whether any individuals involved in that conduct are involved in the operation of the licensee;

(b) if the determination in issue (a) is that individuals involved in the wrongdoing participated either in Borg-Warner's top management or will be involved in the operation of the licensee: 1) to determine the facts and circumstances surrounding the nolo contendere plea of BWC; 2) to determine what effect such findings have on BWA Corporation's and/or its parent Borg-Warner Corporation's requisite qualification to control a Commission licensee and on BPS, Inc.'s basic and comparative qualifications; and 3) to determine the effect of the criminal conviction of BWC for an antitrust violation upon BWA Corporation's and/or its parent Borg-Warner Corporation's requisite qualifications to control a Commission licensee and on BPS, Inc.'s basic and comparative qualifications;

(c) to determine the facts and circumstances surrounding the unauthorized transfer of control of Stations KIA 956 and KSD 312;

(d) to determine the effect of findings made under issue (c) above on BWA Corporation's and/or its parent Borg-Warner Corporation's requisite qualifications to control a Commission licensee and on BPS, Inc.'s basic and comparative qualifications.

(e) to determine on a comparative basis, the nature and extent of service proposed by each applicant, including the rates, charges, maintenance, personnel, practices, classifications, regulations, and facilities pertaining thereto;

(f) to determine on a comparative basis, the areas and populations that each applicant will serve or is presently serving within the prospective 37 dBu contours, based upon the standards set forth in Section 22.504(a) of the Commission's Rules, and to determine the need for the proposed services in said areas; and

(g) to determine, in light of the evidence adduced pursuant to all of the above issues, what disposition of the above-referenced applications would best serve the public interest, convenience, and necessity.

The burden of proof and the burden of proceeding with the introduction of evidence on issues (a) - (d) were placed on BWA, and with respect to the comparative issues (e) and (f) the burden of proof and the burden of proceeding with the introduction of evidence were placed on each of the

applicants as the issue affected them. And the ultimate burden of proof with respect to the conclusory issue (g) was also placed on each of the applicants.

5. In a *Memorandum Opinion and Order* (FCC 80-772), released January 9, 1981,[5] the Commission consolidated BPS' December 9, 1976 application for modification of the licensed facilities of Station KIA 956 to relocate the base station to another site and to change the antenna system (File No. 20355-CD-P-77). The Commission ordered consolidation subject to the condition that Air-Beep and Tel-Car would be permitted to submit new or changed engineering proposals which did not create frequency conflicts with nonparties and which qualified for an exemption from the DPLMRS "cut-off" rule under Section 22.31(e)(1) of the Rules.

6. On March 2, 1981, the Presiding Judge released a *Memorandum Opinion and Order* (FCC 81M-613) which dealt with the proposals of Air-Beep and Tel-Car to amend their applications as earlier authorized by the Commission. Tel-Car was allowed to modify its proposal while Air-Beep's proposed amendment was denied.

7. Prehearing conferences were held in Washington, D.C. on September 15, 1980 and on January 12, 1981. Hearing sessions were held in Miami, Florida on February 2, 3, 4 and 5, 1981. A further hearing conference was held in Washington, D. C. on March 12, 1981 and a further hearing session took place in Washington, D.C. on May 18 1981. A further hearing conference was held in Washington, D.C. on July 1, 1981. Proposed Findings of Fact and Conclusions of Law were filed by the applicants and the Common Carrier Bureau (Bureau) on August 6, 1981. The applicants filed Replies on September 8, 1981.

8. By *Memorandum Opinion and Order* (FCC 81M-3067), released September 25, 1981, the Presiding Judge enlarged the issues against BPS specifying the following two issues, and placing the burden of proceeding with the introduction of evidence upon Air-Beep, and the burden of proof upon BPS:

> To determine all of the facts and circumstances with respect to the guilty and *nolo contendere* pleas to charges of conspiracy in restraint of trade on the part of Wells Fargo Armored Service Corporation and its officials and the effect, if any, on the basic and/or comparative qualifications of Baker Protective Services, Inc. to be a licensee;
>
> To determine whether Baker Protective Services, Inc. violated Section 1.65 of the Commission's Rules, 47 C.F.R. 1.65, relative to reporting of the antitrust proceedings and convictions against Wells Fargo Armored Service Corporation and its officials and, if so, to determine the effect on the basic and/or comparative qualifications of Baker Protective Services, Inc. to be a licensee

9. The Presiding Judge ruled that these issues encompass the question of the representations made in the September 26, 1980 letter.

[5] 84 FCC 2d 432; 48 RR 2d 1155 (1981).

Prehearing conferences were held on October 28, 1981 and February 5, 1982. Hearings were held on June 22, and June 23, 1982 in Washington, D. C. Supplemental Proposed Findings of Fact and Conclusions of law were filed by the applicants and the Bureau on August 6, 1982. The applicants filed Supplemental Replies on August 31, 1982.

Findings of Fact

A. *Anti-Trust Issue Re Wells Fargo Armored Service Corporation*

(1) *Indictments and Civil Complaints*

10. Wells Fargo Armored Service Corp. of Florida (Wells Fargo-Florida) was the licensee of Station KIA 956, Miami from at least 1967 until April 1974 when the license was assigned to Baker Protective Services, Inc. (BPS), the present licensee. Wells Fargo-Florida, during the period 1967-74, was a wholly-owned subsidiary of Wells Fargo Armored Service Corporation (Wells Fargo), a wholly-owned subsidiary of Baker Industries, Incorporated (Baker Industries). BPS has been a wholly-owned subsidiary of Baker Industries during the pertinent time period. Stated simply, Baker Industries was in 1974 and is to the present the parent of both Wells Fargo and BPS (TR 1404, 1420, 1425, 1458-61, 1537-38, 1714-18; AB Ex. 23[6]).

11. On June 21, 1977, an indictment was returned against Brinks, Inc. (Brinks) and Wells Fargo by a federal grand jury sitting in the Northern District of Georgia. *U.S. v. Brinks, Inc.*, Criminal No. 77-207A. The indictment charged Brinks and Wells Fargo with the commission of a felony, namely violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, for a period beginning in 1968 and continuing at least until August 1975. Specifically, Brinks and Wells Fargo were charged with combination and conspiracy to divide, allocate and apportion customers and to submit collusive, non-competitive and rigged bids and price quotations for the providing of armored car and related services in the United States. The indictment made reference to unnamed, unindicted co-conspirators employed by the defendants or their affiliated corporations. (AB Ex. 11)

12. On April 21, 1978, Wells Fargo pled *nolo contendere* to the charges contained in the indictment. Wells Fargo's plea was based on advice of counsel and on a decision by the Board of Directors of Baker Industries that, in view of the time, expense and uncertainty of outcome, it would not be prudent to further litigate the case. Wells Fargo was fined $375,000 by the court (AB Ex. 14; TR 1417-18).

13. On June 21, 1977, the United States Department of Justice filed a civil complaint against against Brinks and Wells Fargo in the Northern District of Georgia, *U.S. v. Brinks, Inc.*, Civil No. C77-1027A. The

[6] Air-Beep exhibits will be designated AB.

complaint alleged violations of Section 1 of the Sherman Act identical to those alleged in the indictment returned against the two corporations. The complaint requested injunctive relief against Brinks and Wells Fargo. Wells Fargo settled the complaint charges against it by consent decree enjoining Wells Fargo and Brinks from taking certain concerted actions pertaining to the armored car service. (AB Ex. 13-16; TR 1418-19, 1559, 1606).[7]

14. On June 21, 1977, an indictment was returned by a federal grand jury sitting in the Northern District of Georgia against certain individuals who were either then current or former officers of Brinks or Wells Fargo, *U.S. v. Jones,* Criminal No. 77-208A. The indictment charged the named defendants with violations of Section 1 of the Sherman Act for a period beginning in 1968 and continuing until at least August 1975. The specific violations alleged were essentially the same as the charges contained in the indictment brought against Brinks and Wells Fargo (AB Ex. 12).

15. Thomas W. Jones (Jones) was President of Wells Fargo from November 11, 1974 until June 4, 1982. Jones joined Wells Fargo in May 1972 as Vice President-International. He became Executive Vice President-Operations in January 1974. Jones also served as a director of Wells Fargo until June 1982. Jones is presently unemployed. (TR 1426, 1638-41)

16. Jones was a named defendant in the cited criminal case (Criminal Number 77-208A). Upon the advice of his personal lawyer, he entered a plea of *nolo contendere* to the charges on April 21, 1978. (TR 1648; AB Exs. 12 and 15)[8] Jones received a one year suspended sentence and one year probation, and was ordered to pay a fine of $20,000. The fine was subsequently reduced to $17,500. Jones paid the fine out of his own funds. (AB Ex. 16; TR 1649)

17. James R. Leidgen (Leidgen) was President of Wells Fargo from 1967 until November 1974 when he left Wells Fargo to become President of Brinks. (TR 1419, 1457, 1642)[9] Since November 1974, Leidgen has had no connection with Wells Fargo, Baker Industries, or any subsidiary of Baker Industries. (TR 1459, 1573)

18. Leidgen was also a named defendant in the cited criminal case (Criminal Number 77-208A). On February 24, 1978, he entered a plea of guilty to the charges. Leidgen was sentenced to one year imprisonment, of which two months were to be served, and two years probation. He was

[7] Malcolm Baker acknowledged that the business of Wells Fargo improved during the 1968-75 period (TR 1481).

[8] Jones was represented by his own attorney, whose fees were paid by Baker Industries (TR 1648). Jones maintained that he performed no illegal acts (TR 1646).

[9] As discussed, *infra,* Leidgen was also a vice-president of Baker Industries from April 1968 to December 1969.

also ordered to pay a $10,000 fine and perform 200 hours of volunteer work. (AB Ex. 16)

19. Other than Jones and Leidgen, no Wells Fargo directors, officers or employees were indicted or otherwise named in the antitrust indictments or complaining. (AB Exs. 11, 12, 13)

(2) *Station KIA 956 and Its Corporate Relationship to Wells Fargo, BPS and Baker Industries*

20. As noted, *supra*, during the relevant period both Wells Fargo and BPS were wholly-owned subsidiaries of Baker Industries. Solomon R. Baker was Chief Executive Officer and Chairman of the Board of Baker Industries commencing at some time prior to 1968 and continuing until December, 1978 and April, 1979, respectively.[10]

21. Solomon Baker's son, Malcolm Baker (Baker), is the President of Baker Industries and its subsidiary, BPS. Baker first joined Baker Industries in February 1967 as Assistant to the President and served in that capacity until 1971 when he became Assistant Vice President. Baker became a Vice President of the company in 1972 or 1973. In 1974 he became Executive Vice President of Baker Industries and in January 1975, President and Chief Operating Officer. In January 1979, Baker became Chief Executive Officer of Baker Industries. He has been a director of Baker Industries since November 1967. He has been a director of Wells Fargo and an officer and director of BPS since 1971. He is presently President of BPS.[11] (TR 1379-82, 1403-04, 1448-49, 1454-55)

22. Baker was not indicted or otherwise named in the Wells Fargo antitrust indictments or complaint. (AB Exs. 11-13) He was not called before the federal grand jury in the Wells Fargo antitrust proceedings, and he was not under investigation in connection with those proceedings. Baker never participated in, or directed anyone to participate in, the activities under investigation in the Wells Fargo antitrust proceedings. As a member of the Wells Fargo Board of Directors since 1971, he never planned any unlawful antitrust activities with other Wells Fargo directors. Prior to receipt of a report from counsel which was conducting an investigation for Baker Industries as to whether antitrust misconduct occurred, Baker had no knowledge of any of the activities alleged to have been unlawful in the antitrust indictments or complaint. (TR 1441-42, 1450-52, 1454-55).

23. As noted, *supra*, Leidgen, who was President of Wells Fargo from September 1967 to November 1974, was also a vice president of Baker

[10] Solomon Baker did not testify in this proceeding.

[11] Malcolm Baker, as Chief Executive Officer of Baker Industries and President of BPS, has ultimate intracorporate responsibility for the BPS renewal applications. (TR 1442-43, 1643-44)

Industries from April 1968 to December 1969. Malcolm Baker explained that Leidgen, however, had no duties or responsibilities with respect to the operations of Baker Industries and that he was made a vice president solely as a matter of job recognition for his performance as president of Wells Fargo. Leidgen resigned his position as vice president of Baker Industries in December 1969 primarily because he did not want his employment agreement disclosed in the Baker Industries' proxy statement. Leidgen was never on the board of directors of Baker Industries. (TR 1440, 1456-57, 1483)

24. As detailed, *supra,* prior to 1974, the Miami DPLMRS Station KIA 956 was licensed to Wells Fargo-Florida which was, at the time, a wholly-owned subsidiary of Wells Fargo. During that period, Leidgen, as President of Wells Fargo had general executive, oversight responsibility for the operation of Wells Fargo-Florida. Malcolm Baker explained that Leidgen never had responsibility for the day-to-day operation of Station KIA 956. There were several layers of management between him and the operations, a regional manager, a district manager, and a branch manager. The branch manager was responsible for the day-to-day supervision of the Miami station. (TR 1459-60, 1462-65, 1663-68)

25. For the period January to April 1974 that he was Executive Vice President-Operations of Wells Fargo, before the license of the Station KIA 956 was assigned to BPS, Jones, like Leidgen, had general executive, oversight responsibility for the operations of Wells Fargo-Florida, including the Station KIA 956. (TR 1460-61)[12] Like Leidgen, however, Jones was never involved in the day-to-day management of the Miami station (TR 1461) Because he was occupied by his other responsibilities when he became Executive Vice President-Operations in January 1974, Jones first heard of the Miami DPLMRS station when it was transferred from Wells Fargo to BPS in April 1974. (TR 1666-67)

26. Jones was never an officer or director of BPS. He has had no connection with the Station KIA 956 since its license was assigned to BPS in April 1974. Similarly, since the assignment of the license of Station KIA 1956 to BPS in April 1974, Wells Fargo has had no involvement with the station and that corporation has not exercised any control over the station. The individuals responsible for the day-to-day operation of the station have not been employees of Wells Fargo. (TR 1420, 1461-62, 1976, 1536, 1639)

27. With the exception of Leidgen, who was an officer of Baker Industries for the period April 1968 to December 1969, no officer, director or employee of Baker Industries was indicted or otherwise named in the Wells Fargo antitrust indictments or complaint. (AB Exs. 11-13) No officer, director or employee of Baker Industries is known by Malcolm

[12] Jones was never an officer, director or employee of Baker Industries. (TR 1455, 1638-39)

Baker to have been an unindicted co-conspirator in the Wells Fargo antitrust proceedings. No officer, director or employee of Baker Industries is known to have been called before the federal grand jury in the Wells Fargo antitrust proceeding. With the exception of Leidgen, no individual who was ever an officer, director or employee of Baker Industries is known to have participated in, directed, or in any way been involved in the activities alleged to be unlawful in the Wells Fargo antitrust proceedings. (TR 1439, 1442, 1453-54, 1543, 1668)

28. As detailed, *supra*, BPS is a wholly-owned subsidiary of Baker Industries. (TR 1420) BPS and Wells Fargo, also wholly-owned by Baker Industries, share no common operating officers. The two companies do not conduct any joint operations or business activities. No BPS officer or employee was ever in the same corporate line of authority as Jones during his tenure at Wells Fargo. (TR 1671) The corporate line of authority goes directly from BPS to Baker Industries without passing through Wells Fargo. (TR 1449-50, 1544, 1671)[13]

29. Since April 1974, BPS has been the licensee of Station KIA 956, Miami, Florida. Frank C. Cole (Cole) has been president and chief operating officer of Wells Fargo Alarm Services, the BPS division responsible for the operation of Station KIA 956 during the entire period BPS has been the licensee. Cole has been a vice president of BPS since 1973 and vice president of Baker Industries since 1979. He has never reported directly to Jones or Leidgen.[14] (TR 1533, 1535, 1537-38, 1541, 1670)

30. Cole was neither indicted nor otherwise named in the Wells Fargo antitrust indictments or complaint. He was not under investigation in the Wells Fargo antitrust proceedings. He never directed anyone to engage in the activities described in the Wells Fargo antitrust indictments.[15] No

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[13] Since 1968, Wells Fargo and BPS shared at least three common officers: (1) Oringer, the financial vice president of Baker, (2) Schneider, a group vice-president of Baker, and (3) Paul L. Rathblott (Rathblott), the legal vice-president of Baker, are all officers of Wells Fargo as well. These three are not operating officers of either corporation and are not involved in the day-to-day operations of Wells Fargo or BPS. (TR 1430) Since July 1980, Rathblott also has served as vice-president and general counsel to Baker Industries. Schneider also serves as a group vice-president of Baker Industries. (Joint Ex. 1; TR 1449-1450, 1639, 1733)

[14] Jones reported initially to Malcolm Vicker and Don McCann, who were presidents of BPS in 1974. In the latter part of 1974 Malcolm Baker became BPS President and after that Cole reported to him. (TR 1542)

[15] No individuals, who participated in the day-to-day management or operation of the Station KIA 956 were indicted in the Wells Fargo antitrust proceedings. No individuals, who participated in the day-to-day management or operation of the Miami station since at least April 1974 are known by Cole to have participated in any of the activities alleged to be unlawful in the antitrust proceedings. To his knowledge, no such individuals directed anyone to participate in the activities alleged to be unlawful in the antitrust proceedings.

officer, director or employee of BPS was indicted or otherwise named in the Wells Fargo antitrust indictments or complaint. No officer, director or employee of BPS is known to have participated in, or directed anyone to participate in, the activities alleged to be unlawful in the antitrust proceedings. (TR 1539-40, 1542, 1670-71; AB Exs. 11-13)

(3) *Station KST 312 and Its Corporate Relationship to Wells Fargo, BPS and Baker Industries*

31. The Chicago DPLMRS Station, KST 312, has been licensed to Eagle Watch and Patrol Service, Inc. (Eagle Watch) since 1979. Eagle Watch is a wholly-owned subsidiary of BPS. Prior to 1979, BPS was the licensee of the Chicago DPLMRS station. (TR 1462, 1538)

32. Station KST 312 has never been licensed to Wells Fargo or any subsidiary of that corporation. Neither Leidgen nor Jones ever had any responsibility for the management or operation of Station KST 312. (TR 1462, 1669)

33. No individuals who have participated in the day-to-day management or operation of the Station KST 312 were indicted in the Wells Fargo antitrust proceedings. No individuals, who have participated in the day-to-day management or operation of the Chicago Station since at least 1974 are known by Cole to have participated in any of the activities alleged to be unlawful in the antitrust proceedings. To his knowledge, no such individuals directed anyone to participate in the activities alleged to be unlawful in the antitrust proceedings. (TR 1545-47; AB Exs. 11-13)

(4) *Counsel's Report Re: Anti-Trust Activities*

34. In preparation for litigation and in order to ascertain the facts concerning any possible antitrust misconduct on the part of Wells Fargo, the board of directors of Baker Industries retained the law firm of Sullivan and Cromwell as outside counsel to conduct an investigation and to report its findings to the Board. One purpose of this investigation and report was to help ensure that no antitrust misconduct would ever occur in the future. (TR 1405, 1408, 1411, 1414, 1431-33, 1468)

35. Outside counsel's report indicated that there may have been instances where Wells Fargo violated the antitrust laws. The report also indicated that Leidgen, who left Wells Fargo in November 1974 to become President of Brinks, was the individual primarily responsible for any wrongdoing. Based on outside counsel's report, the board of directors of Baker Industries determined that, while Jones may not have been totally

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(TR 1545-47; AB Exs. 11-13) Malcolm Baker, in acknowledging that Leidgen may have engaged in negotiations looking to the sale of Station KIA 956, explained that such activity was consistent with Leidgen's supervisory responsibility over the station. (TR 1420-21, 1463-65)

without fault in the antitrust wrongdoing that occurred, his actions were heavily influenced by his relationship with Leidgen. Based on an evaluation of the facts before it, the board of directors of Baker Industries, concluding that Jones was capable of carrying out his duties as president of Wells Fargo in a responsible and lawful manner,[16] continued Jones' employment as president of Wells Fargo. (TR 1417-19, 1427-31, 1482)

36. As noted, *supra,* the criminal indictments and civil complaint stated that certain unindicted co-conspirators participated in violations of the antitrust laws. To the best of Malcolm Baker's recollection, none of those called before the grand jury were directors, officers or employees of Baker Industries. Malcolm Baker has no reason to believe that either he or his father personally were under investigation by the grand jury. Outside counsel employed by Baker Industries to defend the antitrust suits never identified any of Baker Industries' personnel as being involved in the antitrust activities.[17] Malcolm Baker never suggested that outside counsel ascertain the identities of the unindicted co-conspirators. (TR 1451-53, 1467)

(5) *Measures Taken By Baker Industries*

37. In 1975, Solomon R. Baker, then the chief executive officer of Baker Industries, had issued a statement in which he emphasized that the business of Baker Industries was to be conducted in full compliance with the antitrust laws of the United States. In 1977, following the Wells Fargo antitrust indictments, Baker Industries took steps to expand the scope of its antitrust compliance program in order to ensure that there would not be a repeat of the Wells Fargo proceedings.[18] The need to comply with the antitrust laws was discussed at management meetings and managers, down to the branch level in the Baker Industries corporate family, were required to sign a statement indicating that they had read and understood the company's antitrust policy. This program was designed to make clear that the company would not tolerate departure from strict compliance with the antitrust laws. (TR 1405-06, 1413-15, 1477-79, 1482-83, 1656)

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[16] No officer of Baker Industries ever discussed with Jones his previous involvement in the antitrust misconduct. (TR 1650)

[17] Baker Industries acknowledged that none of the principal officers or directors of Baker Industries sought to personally ascertain the facts underlying the indictments or to identify the unnamed co-conspirators. It noted that there was reason to undertake such an inquiry in view of outside counsel's investigation and report.

[18] Jones explained that the major change in policy in 1977 was that it became "more broad in scope in its explanation of the terminology." According to Malcolm Baker, after 1977, the antitrust policy became "more precise" and "more aggressive." (TR 1479, 1656)

B. *The Section 1.65 Issue - Disclosure of the Wells Fargo Anti-Trust Matter*

38. The Commission was not informed of the anti-trust charges brought against Wells Fargo or their subsequent disposition until September 26, 1980. By letter dated September 26, 1980, counsel for Baker informed the Commission, *inter alia,* of facts surrounding the Wells Fargo anti-trust proceedings. (AB Ex. 17) The letter was sent as a result of a meeting held in late August or early September 1980. Those present at the meeting included Dennis M. Stern (Stern), Vice President and Division Counsel of the Wells Fargo Alarm Division of Baker (Wells Fargo Alarm); Michael Kassover (Kassover), a staff attorney at Baker Industries, and E. William Henry (Henry); Arthur Blooston (Blooston) and Lawrence P. Keller (Keller), all outside communications counsel for Baker. At the meeting, either Stern or Kassover mentioned that Wells Fargo had been involved in anti-trust proceedings. Henry, Keller and Blooston asked questions about the matter and Blooston expressed shock that they hadn't been made aware of it earlier. Upon the advice of communications counsel, it was decided that the facts relating to the Wells Fargo anti-trust proceedings should be reported immediately to the FCC in order to ensure full disclosure of all facts in Baker's pending DPLMRS renewal proceedings. (TR 1472-73, 1488-89, 1673-76, 1679) Paul L. Rathblott (Rathblott), Vice President, Secretary and General Counsel of Baker Industries authorized the sending of the letter. (TR 1485, 1489)

39. As detailed, *infra,* the September 26, 1980 letter was initially prepared by Keller based on facts supplied to him. The letter was reviewed by Rathblott and Stern before it was sent. Rathblott and Stern acknowledged that they considered it important that the letter be completely accurate and not misleading. (TR 1489-90, 1497, 1513, 1675, 1682-83, 1695)

40. The letter filed September 26, 1980 made no reference to the indictment and conviction of Leidgen, Wells Fargo's president until November 1974. In fact, the letter represented that Jones was the only Wells Fargo officer charged with wrongdoing in the anti-trust proceedings. (AB Ex. 17, p. 3)

41. The September 26, 1980 letter also represented that:

> Initially, the Miami station was licensed to Wells Fargo Armored Service Corporation of Florida, a wholly-owned subsidiary of Wells Fargo [Armored]. On August 16, 1967, one year prior to any alleged misconduct, the Commission granted an application for the transfer of control of Wells Fargo of Florida from Wells Fargo [Armored] to Wells Fargo Armored Transport Corporation, a separate and wholly-owned subsidiary of Baker Industries, Inc.

The letter went on to represent that "[n]either Wells Fargo [Armored], other than during a period which preceded the alleged misconduct, nor any individual involved in the alleged misconduct, has ever been involved

with the operation or control of the Miami or Chicago stations." (AB Ex. 17, pp. 3, 4)

(1) *Preparation of The September 26, 1980 Letter*

(a) *Failure to Disclose Leidgen's Indictment and Conviction*

42. As noted, *supra,* the September 26, 1980 letter made no reference to the fact that Leidgen, Well's Fargo's president from 1967 to November 1974 was indicted and convicted relative to the anti-trust activities.

43. As Division Vice President and General Counsel of BPS, Stern has day-to-day responsibility for BPS's DPLMRS renewal proceedings. He was not associated with either Wells Fargo or the antitrust proceedings and was not familiar with the facts surrounding the anti-trust indictments and complaint. He asked David E. Wells (Wells) to supply the facts concerning the Wells Fargo anti-trust proceedings to Blooston and Keller.[19] Wells has been Vice President-Law of Wells Fargo since February 9, 1976. He has never been an officer, director or employee of Baker Industries or BPS. (BPS Ex. 21; TR 1456, 1558-59, 1565-66, 1590-91, 1595, 1678-80)

44. Wells did not play an active role as an attorney in the Wells Fargo criminal and civil anti-trust proceedings. Leonard Polisar, then Vice President and General Counsel of Baker Industries, and two outside law firms were responsible for the anti-trust proceedings on behalf of Wells Fargo. However, Wells read the indictments, and he felt he had a sufficient understanding of Wells Fargo's operations and the anti-trust proceedings to supply the necessary facts.[20] Wells knew that the facts were to be relied upon in a proceeding before a federal agency and recognized that the information was important. He believed that the facts he supplied were accurate. (TR 1559-60, 1565, 1587-88, 1593, 1600-02, 1621-23)

45. By letter dated September 12, 1980, Wells informed Blooston of certain facts surrounding the Wells Fargo anti-trust proceedings. (BPS Ex. 21) Importantly, the letter made no mention of the role of Leidgen in the Wells Fargo anti-trust proceedings.[21] (BPS Ex. 21)

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[19] It had been agreed at the late August or early September meeting of Stern, Kassover, Henry, Keller and Blooston that Stern would call Wells and ask him to get in touch with Blooston and provide the needed information. (TR 1557, 1674, 1678)

[20] Wells spent a half-hour preparing his report. Wells relied upon a file in his office which he characterized as "not a very complete file." (TR 1601-02) He did not consult anyone else or study the court records. He assumed he was being asked for "barebone information."

[21] Wells disclosed Jones' conviction. The data about Jones' punishment was extracted by Wells from Jones' personal file without consulting Jones. The information furnished is inconsistent both with official records and Jones' testimony. (AB Ex. 16; TR 1649)

46. Prior to September 26, 1980, Wells had several telephone conversations with Keller and Stern concerning the facts of the Wells Fargo anti-trust proceedings. In these conversations, Wells was informed that the facts he was providing were to be submitted to the FCC. Wells made no mention, however, of Leidgen's participation in the Wells Fargo anti-trust proceedings when he spoke to Stern and Keller. (TR 1569-70, 1592, 1598) Neither Stern nor Keller indicated awareness of Leidgen's indictment in the telephone conversations they had with Wells. (TR 1568-70, 1592, 1598)

47. Wells reviewed the portion of the September 26, 1980 letter which set forth the facts he had provided concerning the Wells Fargo anti-trust proceedings. (TR 1564)[22] The purpose of Well's review was to ensure that the facts set forth concerning the Wells Fargo anti-trust proceedings were complete and accurate. In his review, it did not occur to Wells that the portion of the letter pertaining to the Wells Fargo anti-trust proceeding omitted any reference to Leidgen. (TR 1570) Wells told Keller that the language he reviewed was accurate and complete to the best of his knowledge. (TR 1564, 1590, 1624)

48. Wells never met Leidgen, who left the employ of Wells Fargo approximately two years prior to the time Wells joined the company. Wells knew, however, that Leidgen was a former president of Wells Fargo and also knew that Leidgen had been indicted in the anti-trust proceedings. Wells read the indictments and was aware that the indictment against Leidgen concerned his participation in the anti-competitive activities on behalf of Wells Fargo. (TR 1588) Wells explained that when he was supplying and reviewing information for inclusion in the September 26, 1980 letter, he was focusing solely on Wells Fargo employees at the time of the indictments. Wells further explained that he thought of Leidgen solely in his capacity as president of Brinks and he did not associate Leidgen with Wells Fargo. According to Wells, it simply did not occur to him that Leidgen should have been included in the facts he was providing concerning Wells Fargo's role in the anti-trust proceedings. (TR 1561-62, 1570-71, 1588, 1593-94, 1606)

49. Wells first realized that he had omitted reference to Leidgen in the facts he had provided concerning the Wells Fargo anti-trust proceeding when Leidgen's omission was brought to his attention by Keller in June or July 1981.[23] Wells acknowledged that it was an error not to have included Leidgen's participation in the anti-trust wrongdoing among the facts he supplied for inclusion in the September 26, 1980 letter. (TR 1571, 1622)

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[22] Specifically, he reviewed the material beginning under the caption on p. 2 of the letter and continuing up to the footnote on p. 3. (AB Ex. 17, pp. 2-3; TR 1573)

[23] A "Petition to Enlarge Issues Pertaining to Baker Protective Services, Inc." was filed June 2, 1981 by Air-Beep.

50. Stern reviewed a draft of the September 26, 1980 letter before it was submitted to the FCC. At the time, however, Stern had no knowledge that Leidgen had been indicted or involved in the anti-trust proceedings as a result of his association with Wells Fargo.[24] Relying on the fact that Wells, the in-house counsel for Wells Fargo, had supplied the facts concerning the anti-trust proceedings, Stern believed that the letter made full disclosure and was a correct statement of the situation. (TR 1677, 1681-82, 1692-93, 1705-07)

51. As noted, *supra*, Rathblott, vice-president, Secretary and General Counsel of Baker Industries, authorized the sending of the September 26, 1980 letter to the FCC. Rathblott has overall responsibility for the FCC proceeding. Stern has the day-to-day responsibility for the matter. A few days before Keller's letter of September 26, 1980, was filed with the Commission, Michael Kassover, a staff attorney at Baker Industries, advised Rathblott that outside counsel felt a report should be filed on the reasoning that it might not be necessary but would be the most prudent course. Rathblott accepted this reasoning, reviewed Keller's draft of the letter, made some minor grammatical changes, and authorized the filing of the letter. (TR 1489)

52. Rathblott believed that the draft of the September 26, 1980 letter was accurate. Rathblott, at the time of the filing of the letter, had been with Baker Industries for two and a half months. He did not have sufficient knowledge of the facts of the Wells Fargo anti-trust proceedings to recognize that Leidgen's name had been omitted from the letter. In authorizing that the letter be sent to the FCC, Rathblott relied on the fact that the letter had been reviewed by Wells, Stern and Kassover. (TR 1489-90, 1493-94, 1498-99)

53. At the time the letter was being prepared, Rathblott did not discuss with anyone the issue of Leidgen's involvement in the anti-trust proceedings. The issue of whether to report Leidgen's involvement never came up. Rathblott explained that there was no intention to misstate any fact in the September 26, 1980 letter. Rathblott first became aware that Leidgen's name had been omitted from the September 26, 1980 letter, shortly after the time Air-Beep filed its Petition to Enlarge Issues in June 1981. Up to that time, Rathblott believed that the September 26, 1980 letter was totally accurate. (TR 1494, 1513, 1519, 1523-25)

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[24] Wells acknowledged that he might have heard that Leidgen had been indicted but "certainly not as having anything to do with Wells Fargo." (TR 1685, 1706-07) Further, at the time the September 26, 1980 letter was being prepared, Stern never discussed with anyone whether Leidgen's name should be reported in the letter. (TR 1705)

(b) *Inaccurate Statements in September 26, 1980 Letter re Corporate Control of Wells Fargo-Florida*

54. As noted, *supra*, the September 26, 1980 letter represented that in 1967 the Commission had granted a transfer of control of Wells Fargo-Florida, the licensee of the Miami DPLMRS Station KIA 956 from Wells Fargo to Wells Fargo Armored Transport Corporation (Wells Fargo Transport), "a separate and wholly-owned subsidiary of Baker Industries, Inc."

55. This representation in the September 26, 1980 letter concerning the control of Wells Fargo-Florida was based on a search of FCC files by Blooston, outside communications counsel for BPS. Stern had delegated the responsibility of determining the control of Wells Fargo-Florida to Blooston because Stern thought that the FCC's records would be the best source of information regarding the control of a Commission licensee. At the time the September 26, 1980 letter was prepared, Stern believed that BPS's representation concerning the control of Wells Fargo-Florida was correct. (TR 1698-99, 1716-17, 1719-20, 1722)

56. Stern subsequently learned that BPS's representation of the facts concerning the control of Wells Fargo-Florida was incorrect. (TR 1722-23) Stern discovered the error in November 1981 when he received a telephone call from Keller, outside communications counsel to BPS. Keller told Stern that in the course of his preparation of responses to interrogatories, a question had been raised in his mind as to the accuracy of BPS's statement concerning the relationship of Wells Fargo-Florida to Wells Fargo Armored. After Stern and Keller further investigated the matter to ascertain the facts, BPS filed a "Clarification" with the Commission on November 24, 1981, setting forth the correct relationship between Wells Fargo-Florida and Wells Fargo. (AB Ex. 22) The correct facts, as reported in the "Clarification," are that the corporation that transferred control of Wells Fargo-Florida to Wells Fargo Transport on August 16, 1967, was a New York corporation named Wells Fargo Armored Service Corporation and not Wells Fargo, which was later charged with the anti-trust wrongdoing. However, Wells Fargo Transport (Wells Fargo-Florida's new parent) had changed its name on August 21, 1967 to Wells Fargo Armored Service Corporation (Wells Fargo), the corporation charged with anti-trust misconduct. Stern explained that the confusion over the corporate structure and names resulted from the August 21, 1967 change of name. Accordingly, contrary to the facts represented in the September 26, 1980 letter, Wells Fargo-Florida, the licensee of the Miami DPLMRS station from at least 1967 until 1974, was a wholly-owned subsidiary of Wells Fargo during that period. (AB Ex. 22; TR 1718, 1723-25)

C. *Issue C - The Facts and Circumstances Surrounding The Unauthorized Transfer of Control of Stations KIA 956 and KSD 312*

(1) *Negotiations and Sale To Borg-Warner*

57. Negotiations leading to the acquisition of Baker by Borg-Warner were initiated by Borg-Warner, a publicly held corporation, sometime after July 1977.[25] Initially, the discussions were limited to Malcolm F. Baker, then President and Chief Operating Officer of Baker, his father, Solomon R. Baker, then Chairman of the Board and Chief Executive Officer, and certain representatives of Borg-Warner.[26] The Bakers were represented in the negotiations by the law firm of Sullivan & Cromwell. From the beginning, the negotiations were conducted on behalf of the Bakers as individuals and not on behalf of Baker Industries. As they progressed, other individuals joined the negotiations. Leonard M. Polisar, then Vice-President, General Counsel and Secretary of Baker, became involved in October 1977. Attorneys with the law firm of Sullivan & Cromwell participated in the negotiations on behalf of the Bakers. Both Borg-Warner and Baker were publicly traded corporations listed on the New York Stock Exchange and, as a result, the negotiations were highly sensitive and confidential. The negotiating and discussion sessions were carefully restricted to a very small group of individuals. These preliminary negotiations were concluded successfully on November 4, 1977. (BPS Ex. 2, pp 1-2; BPS Ex. 15, p. 1; TR 932-33, 936, 994, 1020-21)

58. The acquisition of Baker by Borg-Warner was a two part process. First, Solomon and Malcolm Baker sold their stock in Baker, constituting approximately a 10% interest, to Borg-Warner for $20 a share. Second, a public tender offer was made by Borg-Warner for the remaining Baker stock. (TR 931)

59. Baker's Board of Directors was informed of the proposed public tender offer on November 4, 1977. Other than Malcolm and Solomon Baker, this was the first time that the Baker directors learned of the proposed acquisition. (BPS Ex. 15, p. 2; TR 932, 933, 1088) On November 7, 1977 the proposed tender offer and sale of the Baker family stock was publicly announced. (BPS Ex. 4, p. 5; BPS Ex. 15, p. 2; TR 932, 934, 937, 981, 983) This was the first time that Michael A. Kassover and Dennis M. Stern learned of the contemplated acquisition of Baker by Borg-Warner.

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[25] The acquisition was actually made by a wholly-owned subsidiary of Borg-Warner, the BWA Corporation. (BPS Ex. 16, p. 5) Borg-Warner is a corporation engaged in a wide variety of businesses.

[26] Russell J. Parsons, Senior Vice President, General Counsel and Secretary of Borg-Warner, participated in nearly all phases of the negotiations leading to the acquisition by Borg-Warner of Malcolm and Solomon Baker's stock and the subsequent public tender offer. (BPS Ex. 16, pp. 1, 3; TR 998, 1005)

(BPS Ex. 3, p. 1; BPS Ex. 18, p. 2)[27]

60. Following the public announcement, a tender offer statement was prepared and sent to each Baker stockholder with a letter of transmittal indicating that shares of Baker stock would be purchased at $20 per share. (TR 981-82) The initial tender offer expired on December 19, 1977. By that date, a majority of the shares of Baker (approximately 92%) had been irrevocably tendered to Borg-Warner. Accordingly, it was on December 19, 1977 that control of Baker transferred to Borg-Warner. (BPS Ex. 4, p. 5; TR 982)

(2) *Efforts To Determine All Licenses, Permits or Authorizations Held by Baker Prior To Tender Offer*

61. In order to ensure that the proposed Baker acquisition and tender offer were accomplished successfully and in a lawful manner, Borg-Warner retained the law firm of Skadden, Arps, Slate, Meagher and Flom (Skadden, Arps), considered to be one of the leading firms in the country specializing in corporate mergers and acquisitions. (BPS Ex. 16, p. 4) Among its responsibilities in the Baker acquisition, Skadden, Arps was to elicit information from Baker in connection with the proposed tender offer. It was to identify all licenses, permits or regulatory authorizations, if any, held by Baker in order to ensure that the proposed acquisition of Baker by Borg-Warner, would not violate any federal, state, foreign or local laws or regulations.[28] J. Gregory Milmoe, an attorney with Skadden, Arps, reviewed all documents filed by Baker with the Securities and Exchange Commission (SEC) during the five year period preceding the proposed acquisition.[29] As a widely held public company whose shares were listed in the New York and Pacific Stock Exchanges, Baker was required to file information concerning its business operations and financial condition with the SEC. In particular, SEC regulations require disclosure concerning all licenses, permits or authorizations from regulatory agencies which are material to the conduct of a company's business. (BPS Ex. 4, p. 2) The licenses and authorizations held by Baker and/or its subsidiaries, were required to be listed in Baker's Form 10-K, a report filed annually with the SEC. (BPS Ex. 3, p. 3)

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[27] Kassover, at the time, was a member of Baker's legal staff and Stern, counsel of Wells Fargo Alarm, was responsible with respect to the amending DPLMRS renewal applications. (BPS Exs. 3 and 18)

[28] In addition to FCC authorizations, licenses administered by a number of federal agencies, including the Interstate Commerce Commission and the Civil Aeronautics Board, may not in most instances be transferred without the prior approval of those agencies. (BPS Ex. 4, p. 2)

[29] Milmoe was primarily responsible for coordinating the review of all information about Baker which was available. (BPS Ex. 4, p. 1)

62. In addition to reviewing the SEC documents, Skadden, Arps, on behalf of Borg-Warner, gathered information about Baker from other public sources including the New York Times data bank (a computerized service containing articles and information from hundreds of newspapers and other periodicals), financial digests (such as Moodys and Standard & Poor's), LEXIS (a computerized legal research service), and court records in certain jurisdictions where Baker conducted its principal business activities. Because of the expense and need to maintain secrecy prior to the public disclosure of a transaction involving a publicly traded company, Skadden, Arps usually did not make inquiries to the numerous agencies other than the SEC except when warranted by the facts ascertained in its search of documents and other information sources. (BPS Ex. 4, pp. 2-3)

63. The review conducted by Skadden, Arps showed that Baker was subject to regulation by a number of federal, state, foreign and local regulatory authorities, including the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB), from which prior approval for the proposed acquisition would be required. Baker's ICC and CAB authorizations were noted in at least one of the Form 10-K's reviewed by Skadden, Arps. None of the publicly available materials reviewed by Milmore or others at Skadden, Arps mentioned the existence of Baker's Miami DPLMRS station, or any other FCC license or authorization held by Baker or any of its divisions or subsidiaries. (BPS Ex. 4, p. 3; TR 1027)

64. Based on a review of the publicly available information, Milmoe and Roger A. Aaron, a partner at Skadden, Arps, prepared a "checklist" of items to be discussed with representatives of Baker. In early October 1977, Messrs. Milmoe and Aaron met with Leonard M. Polisar, then Vice-President and General Counsel of Baker, in order to confirm the results of the review of publicly available information conducted by Skadden, Arps and to obtain additional information regarding items on the checklist. Russell J. Parsons, General Counsel of Borg-Warner, and Bernard M. Aidinoff and Norris Darrell, Jr., partners at Sullivan & Cromwell, counsel for Baker, were also present at this October 1977 meeting. (BPS Ex. 4 pp. 3-4, Attachment A; Tr 1023-24)

65. At this meeting, Milmoe and/or Aaron discussed in detail with Polisar and the other lawyers representing Baker the need to obtain approval from the ICC and CAB prior to consummating the transaction, and the procedures to be followed at those agencies to obtain such approval. They also discussed certain other foreign, state and local regulatory agencies whose prior approval was not necessary in order for the transaction to proceed. (BPS Ex. 2, p. 3; BPS Ex. 4, p. 4) At the end of the discussion concerning the regulatory agencies identified in Skadden, Arps' review of publicly available information, Milmoe or Aaron asked Polisar whether he was aware of any other licenses, permits or authoriza-

tions held by Baker which had not been discussed. Polisar stated that he was not aware of any such authorizations. (BPS Ex. 2, pp. 3-4; BPS Ex. 4, pp. 4-5; TR 1025)

66. The need to obtain prior FCC approval for Borg-Warner's proposed acquisition of Baker was not discussed at any other meeting or negotiating session between representatives of these two companies. (BPS Ex. 2, p. 4; BPS Ex. 15, p. 2; BPS Ex. 16, p. 4)

67. Based on its review of the material concerning Baker, and the meetings with Baker representatives, Skadden, Arps advised Borg-Warner that apart from the ICC and CAB, it was unaware of any U.S. government regulatory agency whose consent or approval was required in order to complete the acquisition. This advice served as the basis for Borg-Warner's statement in the public tender offer material submitted to the SEC that Borg-Warner was not aware of any other "license or regulatory permit which appears likely to be adversely affected by the . . . acquisition." If Borg-Warner had known about the DPLMRS station licenses at that time, and that prior FCC approval of the proposed transfer of control was required, that information would have been included in the tender offer statement. (BPS Ex. 4, p. 5; TR 1052)

68. At a meeting on November 4, 1977, the Borg-Warner board of directors adopted a resolution which, among other things, directed the officers of Borg-Warner to file with the appropriate governmental authorities whatever applications were necessary to effectuate the acquisition of Baker by Borg-Warner. (BPS Ex. 16, p. 5)[30] Prior to the consummation of the acquisition, Borg-Warner applied for and received the prior approval of the CAB for the transfer of a Baker CAB license; it also obtained an informal option letter from the staff of the ICC that ICC approval would not be required, for a transfer of control of Baker's ICC authorizations to Borg-Warner. (BPS Ex. 2, p. 4; BPS Ex. 4, p. 5; BPS Ex. 16, p. 5; TR 1000)

(3) *January 3, 1978 Blooston Letter re Unauthorized Transfer*

69. By transmittal dated December 13, 1977, the law offices of Jeremiah Courtney, then Baker's communications counsel, notified Baker of the need to file, by January 31, 1978, a new FCC Form 430 for BPS for the year ended December 13, 1977. This notice was received by Michael A. Kassover of Baker's legal staff on or about December 20, 1977. (BPS Ex. 3, p. 2, Attachment A; TR 962)

[30] The need to obtain FCC approval was never discussed by the Borg-Warner Board of Directors during the period when the Baker acquisition and tender offer was being considered, September 1977 through January 1978. Nor did the board discuss the need to obtain FCC consent prior to the completion of the tender offer or at any meeting through early January 1978. (BPS Ex. 16, p. 5; TR 1001-02, 1088-89)

70. On December 28, 1977, Kassover wrote Borg-Warner for ownership information required to complete the FCC Form 430, and sent a copy of his letter to Courtney. On January 5, 1978, Kassover received a letter dated January 3, 1978, from Arthur Blooston of Courtney's office. Blooston's letter indicated that if a transfer of control of Baker had taken place as suggested by Kassover's letter of December 28, 1977, the transfer had been accomplished without the necessary prior approval of the FCC. Upon receipt of Blooston's letter, Kassover immediately notified Polisar of the problem and together they notified Borg-Warner of the need to make application to the FCC.[31] (BPS Ex. 3, Attachments A-C)

71. Baker, on February 6, 1978, notified the FCC of the oversight and requested Special Temporary Authority for Borg-Warner to operate the Miami and Chicago stations. On February 27, 1978 applications seeking consent to the transfer of control were filed. Malcolm Baker told Polisar that he was disappointed that prior FCC approval had not been obtained, that Polisar should pursue the matter to the best of his ability with outside counsel to resolve it expeditiously, and that Baker should take whatever steps were necessary to ensure that in the future it was in complete compliance with FCC rules and regulations. (BPS Ex. 2, p. 5; TR 963-64, 1034-35; 1111-12, 1113, 1120)

(4) *Explanation For Failure To Obtain Prior FCC Approval*

72. As noted, *supra*, Baker's Form 10-K filed with the SEC did not include a description of the company's FCC authorizations. Kassover, Baker's senior corporate attorney, explained that while the FCC authorizations were essential to certain of Baker's local operations, taken as a whole they were not material, in a financial sense, to any major line of business in which Baker was engaged. Kassover further explained that the FCC authorizations were not required by the SEC to be included in the Form 10-K.[32] (BPS Ex. 3, p. 3; TR 981, 1049)

73. Since Baker's FCC authorizations were not included in its Form 10-K or in the other publicly available material reviewed by Skadden, Arps, the authorizations were not specifically included on the "checklist" prepared by Messrs. Milmoe and Aaron of Skadden, Arps and were not the subject of discussion with Polisar at the meeting held in early October 1977. (BPS Ex. 4, pp. 3-4) When Messrs. Milmoe and Aaron questioned Polisar as to whether there were other licenses, permits or authorizations that were held by Baker but not on the checklist, the question did not

[31] Prior to this, no one had asked Kassover whether prior FCC approval was required. (TR 1060)

[32] Polisar explained that the Miami and Chicago licensed DPLMRS facilities, their revenues and profits (or losses) were so small in relation to the total revenues and profits of Baker as not to require any reference in any Form 10-K or other financial or operating information filed with the SEC by Baker. (BPS Ex. 2, pp. 5-6)

trigger in Polisar's mind the need to seek prior FCC approval for the transfer of control. (Baker Ex. 2, p. 4; TR 980)

74. Polisar explained that, because of the relatively small size of Baker's FCC-licensed facilities in comparison to its total operations, he did not think about the licenses in connection with the acquisition of Baker by Borg-Warner, either before or after the tender offer became public. Almost all of the FCC licenses held by Baker's subsidiaries were private radio licenses used for intra-company communications with its own employees. In contrast to Baker's ICC and CAB authorizations, these private radio licenses, while important in conducting Baker's internal operations, were not, according to Polisar, the underlying authorizations for any basic segment of Baker's business. (BPS Ex. 2, pp. 5-7)

75. Polisar acknowledged his general familiarity with the Miami and Chicago DPLMRS stations. However, those licenses simply did not come to Polisar's mind when he reviewed various aspects of the Borg-Warner acquisition with Messrs. Aaron and Milmoe. Polisar maintained that prior to the receipt of Blooston's letter in early January 1978, he was not aware that the FCC had a requirement that a license could not be assigned or transferred without the Commission's prior written consent. (BPS Ex. 2, pp. 4-6; TR 949, 950) He attributed to himself a very limited familiarity with FCC matters in general and virtually no knowledge of FCC rules and regulations. (BPS Ex. 15, p. 2; TR 938, 939, 944-45, 1093)

76. Polisar acknowledged that he signed an application, dated February 25, 1974, requesting FCC consent for the assignment of Station KIA 956, Miami, from Wells Fargo-Florida to BPS. (AB Ex 23; Joint Ex. 1, p. 1) Although he has no independent recollection of signing the application, from his review thereof it is apparent to him that the application was prepared by the law office of Jeremiah Courtney, Baker's communications counsel. (Joint Ex. 1, p. 2) As is his custom and habit whenever a document is prepared by another individual, Polisar is certain that he reviewed the application for completeness and accuracy before signing it and he discussed its significance and reasons for its filing. Polisar explained that, as chief legal officer for Baker, he reviewed and signed countless documents, correspondence and other items which were prepared by his staff, other employees of Baker or its subsidiaries, or outside counsel. He does not remember many of the items he signed over the years; nor does he remember their surrounding circumstances. (Joint Ex. 1, pp. 2-3)

77. Polisar did not recall the 1974 application nearly four years later when he became involved in the negotiations and discussions leading to the acquisition of Baker by a wholly-owned subsidiary of Borg-Warner. Polisar noted that the Borg-Warner transaction differed from the transaction covered by the 1974 application in that the 1974 transaction involved the actual direct assignment of a license from one subsidiary of

Baker to another, whereas the Borg-Warner transaction involved a transfer of control of the corporate parent (Baker) of the licensee (BPS) from the shareholders of the corporate parent to another corporation. (Joint Ex. 1, pp. 3-4) He explained that nothing transpired during the negotiations and discussions between Baker and Borg-Warner to give rise to recalling the earlier assignment application or to have him focus on BPS's FCC-licensed facilities or otherwise make him realize the need to seek prior FCC approval for the then contemplated acquisition of the stock of Baker by Borg-Warner. (Joint Ex. 1, p. 4)

78. Polisar, at the time of the merger, was aware that some type of renewal application was pending with respect to the Miami radio facility. However he was not directly involved in these proceedings. Ronald Mealey of Polisar's staff initially had primary in-house responsibility for the renewal applications. When Mealey left Baker in early 1977, Dennis M. Stern became responsible for the renewal proceedings. (BPS Ex. 2, p. 6; TR 944) Stern did not attend the meeting with Mssrs. Milmoe, Aaron and Polisar in which the need for various regulatory approvals was discussed. Stern first learned of the Borg-Warner tender offer in November 1977, when it was announced to the public. While Stern may have been contacted about one or more aspects of the Wells Fargo Alarm Division's operations during the period in which the tender offer was outstanding, he was never asked whether FCC approval of Borg-Warner's planned acquisition was required. (BPS Ex. 18; TR 1157)

79. Although Stern discussed with Polisar matters relating to certain Wells Fargo detective and guard licenses during the pendency of the tender offer, they never discussed the need to obtain FCC approval. Because Stern lacked experience in FCC matters, it never occurred to him that such approval was necessary. He first learned of the need for FCC approval when it was brought to his attention by either Polisar or Kassover in early January 1978. (Baker Ex. 18, p. 2; TR 1143, 1157)

80. As President of Baker, Malcolm Baker was aware that BPS held licenses for land mobile radio stations in Miami and Chicago. However, he does not believe he discussed them with Borg-Warner representative since his discussion focused principally on the major categories of Baker's operations as opposed to individual lines of business such as the two stations. (BPS Ex. 15; TR 1104)

81. Malcolm Baker denied that he was aware, at least before receipt of Blooston's letter in early January 1978, that prior FCC approval was required before Borg-Warner could acquire control of Baker. (TR 1090, 1111, 1129-31) This requirement was never called to his attention by any individual during the negotiating sessions or prior to completion of the

public tender offer by Borg-Warner for Baker's stock. (BPS Ex. 15)[33]

82. Malcolm Baker explained that had he been apprised of the need to obtain prior FCC approval he would have ensured that such approval was sought and received.[34] He further explained that had he learned of the FCC requirement after the tender he would have had no motive to proceed without FCC approval because he and his father had sold their stock for cash and the sale was completed on November 7, 1977. (BPS Ex. 15; TR 1090)

83. Prior to December 19, 1977, the day the transfer of control was effectuated, no one connected with the law firm of Skadden, Arps, and, to Milmoe's knowledge, no one connected with Borg-Warner was aware that Baker was operating a communications common carrier facility in Miami or Chicago. (TR 1034)

84. Parsons of Borg-Warner had no knowledge that Baker's subsidiary BPS held licenses for mobile radio telephone stations in Miami and Chicago and other FCC authorizations which required prior FCC approval for a transfer of control, before being informed of that fact in January 1978. (BPS Ex. 16, p. 4; TR 1005-06)

D. *Issues (a) and (b) - Anti-Trust Conviction and Nolo Contendere Plea re Borg-Warner and Whether Individuals Involved In Such Conduct Are Involved in Operation of DPLMRS Stations KSD 312 and KIA 956*

85. In 1966, Borg-Warner was indicted by a federal grand jury. The indictment in *U.S.* v. *American Radiator and Standard Sanitary Corporation* (*American Radiator*), Criminal No. 66-295 (W.D. Pa.), charged eight corporations, including Borg-Warner, a trade association, and eight individuals, one of whom was associated with Borg-Warner, with an unlawful combination and conspiracy in unreasonable restraint of trade and commerce in enameled cast iron and vitreous china plumbing fixtures for the period between 1962 and 1966, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.[35] In 1969, after trial, Borg-Warner was found guilty as charged and fined $50,000. (Baker Ex. 1, p. 2, Att. 1)

86. On June 29, 1971, a federal grand jury returned an indictment against Borg-Warner. The indictment in this criminal proceeding, *U.S.* v. *R. & G. Sloane Manufacturing Co., Inc.* (*R & G Sloane*), Criminal No.

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[33] According to Malcolm Baker, his father, Solomon Baker, at the time Baker's Board Chairman and Chief Executive Officer, did not indicate that he had knowledge of the need for prior FCC approval at the time he learned that it had not been sought. (TR 1132)

[34] Malcolm and Solomon Baker made no warranties to Borg-Warner in connection with the sale of their individual shares and their sale was not conditional upon the success of the public tender offer. (TR 1087-85)

[35] The indictment charged that unnamed and unindicted corporations and individuals participated in the conspiracy. (Baker Ex. 1, Att. 1, p. 10)

8379 (C.D. Cal.), charged five corporate defendants, including Borg-Warner, and two individuals, none of whom was associated with Borg-Warner, with combination and conspiracy in restraint of trade in DMW plastic pipe fittings for the period between 1966 and 1971, in violation of Section 1 of the Sherman Act. In 1974, Borg-Warner pleaded *nolo contendere* and was fined $20,000. (TR 1163(a); Baker Ex. 1, p. 4, Att. 2)[36]

87. George W. Kelch was indicted as a co-defendant in the *American Standard* proceeding. During the period in which the wrongdoing allegedly occurred, he was President and General Manager of the Ingersol-Humphreys Division, the Borg-Warner unit which manufactured plumbing fixtures. (Baker Ex. 1, p. 2) Michael Veerecke, Vice President and Sales Manager of that division, was not indicted, but testified as a witness on behalf of Borg-Warner. There is no evidence that Veerecke either participated in the alleged misconduct or had knowledge thereof. (Baker Ex. 1)

88. Kelch was represented by separate counsel in the *American Standard* proceeding and eventually pleaded *nolo contendere.* Kelch has not been associated with Borg-Warner or any of its subsidiaries since 1966.[37] He has never been associated with BPS. Veerecke, who testified on behalf of Borg-Warner, has not been associated with Borg-Warner or any of its subsidiaries since his retirement from Borg-Warner in or about 1970. (Baker Ex. 1, p. 3)

89. Kelch's and Veerecke's duties and responsibilities concerned solely the operations of the Ingersol-Humphreys Division.[38] Neither Kelch nor Veerecke has ever been employed by the Wells Fargo Alarm Division of BPS or has ever been involved in the operations of the Chicago or Miami mobile radio stations. Neither Kelch nor Veerecke has ever occupied top management positions at Borg-Warner, either as directors of the corporation, general corporate officers or employees with corporate-wide responsibilities. (Baker Ex. 1, p. 3; Baker Ex. 14, pp. 1-2)[39]

90. Jack Haher (Haher), at the time the Sales Manager for Pipe and Products Materials of Borg-Warner's Chemicals Division, was not indicted in the *R & G Sloane* proceeding. However, he was named by government attorneys in a bill of particulars as having possibly participated in alleged misconduct. Other than the government's assertion, never proved, there is no evidence establishing that Haher participated in the alleged wrongdo-

[36] The indictment also charged that various unnamed and unindicted corporations, companies and individuals engaged in the conspiracy. (Baker Ex. 1, Att. 2, p. 19)

[37] Kelch resigned his position and terminated his employment with Borg-Warner three months prior to his indictment in 1966.

[38] The Ingersol-Humphreys Division was eventually renamed the Borg-Warner Plumbing Products Division and sold to outside investors in 1976. (Baker Ex. 1)

[39] Neither Kelch or Veerecke testified in this proceeding.

ing or had knowledge thereof. (Baker Ex. 1, p. 5)[40]

91. Haher's duties and responsibilities at the time of the alleged wrongdoing related solely to certain specialized sales functions of Borg-Warner's Chemicals Division. The Chemicals Division included the Pipe and Products Division which manufactured and distributed DMW plastic pipe fittings.[41] Haher has never occupied a top management position at Borg-Warner, either as director of the corporation, general corporate officer, or employee with corporate-wide responsibilities. (Baker Ex. 1, p. 5)

92. Haher is presently employed as a salesman with Borg-Warner's Chemical Division in Parkersburg, West Virginia. He has been in that position on a full-time basis for at least the past five years. Haher has never been employed by the Wells Fargo Alarm Division of BPS, or involved in, or associated with, the day-to-day operation of BPS or the Miami and Chicago radio stations. (Baker Ex. 1, pp. 5-6; Baker Ex. 14, pp. 1-2)

93. Charles W. Houchins (Houchins), presently Associate General Counsel of Borg-Warner, and Russell J. Parsons (Parsons), presently Senior Vice-President, General Counsel and Secretary of Borg-Warner, testified concerning whether Borg-Warner's top management and/or individuals involved in the operation of BPS's Miami and Chicago radio stations were involved in the antitrust misconduct charged in the *American Standard* and *R & G Sloane* proceedings.

(a) *Role of Charles W. Houchins re American Standard Case*

94. Houchins has held various positions in the legal department of Borg-Warner since 1956. As part of his responsibilities at Borg-Warner, he served as in-house counsel specifically charged with overseeing and coordinating Borg-Warner's defense in the *American Standard* proceeding. (Baker Ex. 1)

95. Houchins devoted a substantial amount of time to the *American Standard* proceeding between 1966 and 1969. His involvement began approximately one year before the indictment when a federal grand jury issued subpoenas *duces tecum* for the production of documents relating to the plumbing products industry. (TR 1164; Baker Ex. 1) Houchins personally supervised the gathering of documents responsive to the subpoenas and made several submissions on behalf of Borg-Warner to the federal prosecutors who were conducting the grant jury proceeding in Pittsburg. When the government subsequently issued subpoenas *ad testificandum*, Houchins briefed the individuals who were subpoenaed, prepared those individuals for their appearances before the grand jury,

[40] Haher did not testify in this proceeding.

[41] The Borg-Warner Pipe and Products Division was liquidated in 1971. (Baker Ex. 1, p. 6)

and participated in the debriefing process after each witness had testified.[42] (TR 1165, 1189; Baker Ex. 1)

96. Houchins personally debriefed employees of Borg-Warner who testified before the grand jury, and participated in the debriefing of about one-half of the other witnesses, including those from other companies. In the course of briefing and debriefing the various grand jury witnesses, Houchins questioned the individuals with respect to their testimony before the grand jury and with respect to the participation or non-participation of other Borg-Warner employees in the alleged misconduct. (TR 1165, 1168, 1182)

97. When the indictments in the *American Standard* proceeding were returned, Houchins spearheaded Borg-Warner's evaluation of the case, its preparation for trial, and its participation in the trial, which lasted approximately three months. (TR 1165)

98. Houchins explained that, as a result of his participation in the *American Standard* proceeding and in subsequent private lawsuits against Borg-Warner stemming therefrom, he acquired knowledge as to the individuals associated with Borg-Warner who might have been involved in the alleged wrongdoing, including the nature and extent of their alleged participation, their positions at Borg-Warner and job responsibilities, and their present association, if any, Borg-Warner or its subsidiaries. (Baker Ex. 1, pp. 1-2; TR 1178)

(b) *Houchins Role re The R & G Sloane Case*[43]

99. Houchins also served as in-house counsel in charge of overseeing and coordinating the defense of Borg-Warner in the *R & G Sloane* case in which Borg-Warner was indicted in 1971. (Baker Ex. 1, p. 4, Att. 2) Houchins devoted time to the *R & G Sloane* case between 1971 and 1974. His duties with respect to the *R & G Sloane* case were primarily identical to his duties with respect to the *American Standard* proceeding. (TR 1165)

100. Houchins explained that, as a result of his participation in the *R & G Sloane* case and in private lawsuits stemming therefrom, he acquired knowledge of the facts and circumstances surrounding the misconduct alleged in that proceeding. He claimed that he gained knowledge of the individuals associated with Borg-Warner who might have been involved in the alleged wrongdoing, including the nature and extent of their alleged participation, their positions at Borg-Warner and job responsibilities, and

[42] Debriefing involves questioning a witness immediately after he left the grand jury room as to each question the witness was asked and his response thereto.

[43] Houchins was the only person at Borg-Warner, including the corporation's officers and directors, who was involved in the company's investigation into the facts and circumstances surrounding the misconduct alleged in both the *American Standard* and *R & G Sloane* cases. (TR 1172-73)

their present association, if any, with Borg-Warner or its subsidiaries. (TR 1178; Baker Ex. 1, p. 4) Houchins expressed the opinion that no other individuals associated with Borg-Warner, to the best of his knowledge, were in any way involved in the misconduct alleged in the *American Standard* or *R & G Sloane* proceedings. (TR 1172; Baker Ex. 1, p. 2, 5)

101. In evaluating Houchin's testimony it is noted that: (1) his knowledge was confined to that gained in briefing and debriefing witnesses, attending depositions and trials and reading dockets and documents, since he did not participate in the events which led to the indictments; (2) the grand jury minutes were never available to him;[44] and (3) the only corporate employee who was personally indicted, Kelch, had resigned from Borg-Warner prior to the indictment and it is not clear to what extent Kelch had a motive to cooperate with Houchins in supplying information about the grand jury proceedings. (TR 1166-68, 1186-87)

(c) *Parson's Role re The American Standard and R & G Sloane Cases*

102. In 1962 at the start of the period covered by the *American Standard* indictment, Parsons was Assistant General Counsel and Assistant Secretary of Borg-Warner. From 1965 through 1966 he was Secretary and Assistant General Counsel. (TR 998; Baker Ex. 16, p. 1)

103. As Secretary of the corporation, Parsons attended most, if not all, of the meetings of the Board of Directors of Borg-Warner during the period 1965 through 1966. Prior to his testimony he reviewed the minutes of the meetings of the Board of Directors from 1962 through 1964. From 1966 through 1971, the period covered by the indictment in the *R & G Sloane* case, Parsons continued as Secretary of Borg-Warner.[45] As Secretary of the corporation, Parsons attended most, if not all, of the meetings of the Board of Directors of Borg-Warner during the period covered by the indictment in the *R & G Sloane* proceeding. (Baker Ex. 16, pp. 1 - 3)

104. Parsons recalled that at least until the time that Borg-Warner learned of the government's investigation or grand jury proceeding, nothing was discussed in the meetings of Borg-Warner's Board of Directors which related directly or indirectly to the misconduct alleged in the *American Standard* and *R & G Sloane* proceeding. (Baker Ex. 16, pp. 2-3)

105. Parsons, as did Houchins, expressed the view that no individuals who was, either during the period charged in the *American Standard* indictment or at the present time, a general corporate officer or director

[44] Houchins did not know the names or corporate affiliations of the unnamed and unindicted co-conspirators who were referenced in the indictments.

[45] He became Associate General Counsel in 1968.

of Borg-Warner or an employee with corporate-wide responsibilities, was involved in the alleged wrongdoing. (TR 1175-76, 1191; Baker Ex. 16, p. 2)

106. He also expressed the view that no one who was a general corporate officer or director of Borg-Warner, or an employee with corporate-wide responsibilities, was in any way involved with the wrongdoing alleged in the *R & G Sloane* proceeding. (TR 1191; Baker Ex. 16 p. 3)

(d) *Borg-Warner Management re Stations KSD 312 and KIA 956*

107. The top management of Borg-Warner is not involved in the day-to-day operations of BPS or the Miami and Chicago radio stations. No officer, director, or employee of Borg-Warner, or any of its subsidiaries, was involved in the management or operations of the Wells Fargo Alarm Division of BPS or the Miami or Chicago mobile radio stations prior to the time that Borg-Warner acquired control of Baker in December 1977. Since December 1977 no officer, director or employee of Borg-Warner has ever been employed by the Wells Fargo Alarm Division of BPS or has ever been involved in the operations of the two stations.[46] (Baker Ex. 14, p. 1)

108. Cole emphasized that none of the individuals identified by Houchins in connection with the antitrust misconduct have ever been involved in the operations of the two radio stations. (Baker Ex. 14, pp. 1-2)

E. *Issues (e) and (f) - The Comparative Issues*

1. *Baker Protective Services, Inc. (BPS)*

(a) *Ownership, Management and Personnel*

109. BPS is a Delaware corporation with its principal office in Parsippany, New Jersey. Since January, 1978, BPS has been ultimately owned by Borg-Warner Corporation, a Delaware corporation, whose principal office is in Chicago, Illinois. (Baker Ex. 9, p. 2)

110. BPS is organized into two divisions: The Wells Fargo Alarm Services Division (Wells Fargo Alarm) and The Wells Fargo Guard Services Division (Wells Fargo Guard). Wells Fargo Alarm is engaged in the manufacture, sale, leasing and monitoring of fire, burglar and industrial alarm systems and in the management and operation of BPS' radio common carrier facilities. Wells Fargo Guard provides security guards and investigators for banks, airports, factories, hospitals, colleges and similar institutions. (Baker Ex. 9)

111. In addition to Station KIA956 in Miami, the only other DPLMRS facility licensed to or sought by BPS or any other member of the BPS or

[46] Since 1972 Frank C. Cole has been President and Chief Operating Officer of the Wells Fargo Alarm Division of BPS, the division responsible for the total operations of the Miami and Chicago mobile radio stations. Cole has also been a Vice President of BPS since 1973. (Baker Ex. 14, p. 1)

Borg-Warner corporate family is Station KSD 312, Chicago, Illinois, a one-channel facility authorized to Eagle Watch and Patrol Service, Inc. (Eagle Watch), a BPS subsidiary. BPS and its Wells Fargo Alarm and Guard Divisions are also the licensees of approximately 50 stations in the Business Radio Service, General Mobile Radio Service and Radiolocation Service at various locations throughout the continental United States. (Baker Ex. 9)

112. Station KIA 956 is managed by employees of Wells Fargo Alarm. It was managed on a day-to-day basis from January, 1978 to October 19, 1981 by Robert S. Cox, the Branch Manager of BPS' and Wells Fargo's Miami office. Cox had direct or supervisory responsibilities with respect to virtually all aspects of station operation, including service offerings, customer relations, equipment selection, budgeting, billing, employee performance and contractor oversight. Cox, who also managed Wells Fargo's Miami alarm service business, devoted as much time as necessary to these radio common carrier duties. He managed the station under guidelines handed down by division management. (TR 457; Baker Ex. 9, pp. 25-26)[47]

113. The Miami branch manager reports directly to Louis Cardoni, the Regional Manager of BPS' and Wells Fargo's Southeast Region, who is also stationed at the Miami office. Cardoni, in turn, reports to Michael H. Novak, Wells Fargo's Vice President of Operations, who resides in Pennsylvania. Novak reports to Frank C. Cole, BPS' Vice-President and Wells Fargo's President, who also is a Pennsylvania resident.[48] Cole, who has held the ultimate responsibility for the management and development of Station KIA 956 since 1974, has not visited the station since 1978.[49] Dennis M. Stern, Wells Fargo's Vice President and Division Counsel, has responsibilities concerning review of FCC applications and compliance with FCC regulations. (TR 293, 321, 335-36; Baker Ex. 9, pp. 23-24)

114. Cox was assisted by Ms. Barbara Barreto, an employee in BPS' Miami office. Ms. Barreto, who has since left the employ of BPS, served as BPS' primary contact person with potential and existing Station KIA 956 subscribers, monitored station traffic and maintained station re-

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[47] Cox's employment was terminated October 19, 1981. He was initially replaced by Louis Cardoni and ultimately by Philip R. Harper. (BPS Statement, November 6, 1981; BPS Petition For Leave To Amend, July 20, 1982)

[48] Needless to say, the responsibilities of Cole, Novak and Cardoni were not limited to the Miami station. The record is silent as to the amount of time each devotes to the affairs of the Miami station.

[49] Cole reports to Mr. Charles R. Schneider, Group Vice-President of the Wells Fargo Group of BPS. (Baker Ex. 13)

cords.[50] (Baker Ex. 9, p. 26)

(b) *Service and Charges*

115. Station KIA 956 presently offers interconnected, manual two-way mobile telephone service; interconnected, direct dial tone-plus-voice radio paging service; interconnected, direct dial tone-only radio paging service; and noninterconnected, manual message relay service. (Baker Ex. 9, p. 8; Baker Ex. 13, p. 1)

116. Station KIA 956's existing and proposed rates and charges are (Baker Ex. 9, pp. 14-15; Petition For Leave To Amend, July 20, 1982):

Manual, Interconnected Two-Way Service

Monthly Service (including 80 one-minute calls, per unit):	$24.00
Monthly interconnection fee:	1.00
Additional calls (per one-minute call):	0.15
Rental equipment (per month, per unit):	24.00
Maintenance (per month, per unit)	7.50

Tone-Plus-Voice Paging Service

With rental equipment (unlimited calls)	
First unit (per month):	32.50
Second unit (per month):	29.50
Additional units (per month, per unit):	26.50
Without rental equipment (per unit):	22.00

Tone-Only Paging Service

With rental equipment (unlimited calls)	
First unit (per month):	20.00
Second unit (per month):	17.50
Additional units (per month, per unit):	15.00
Without rental equipment (unlimited calls)	
Per unit (per month):	11.00

Noninterconnected Message Relay Service

Monthly service (including 100 one-minute calls, per unit):	17.50
Additional calls (per one-minute call):	0.12
Rental equipment (per month, per unit):	20.00

(c) *Facilities and Equipment*

117. At the time of the hearing, Station KIA 956's base facility was located at 100 South Biscayne Boulevard in Miami. (TR 299, 436) Due to high inter-modulation interference and the signal shielding impact of a nearby 400-foot building, BPS, in December 1976, proposed to move this base station to a new site at 2333 Brickell Avenue in Miami. (Baker Ex. 9,

[50] Ms. Barreto was initially replaced by Bonnie Mingo and later by Orfelina Tortosa. (BPS Statement, November 6, 1981; BPS Petition To Amend, July 20, 1982) Neither testified in this proceeding.

pp. 4, 5, 36) It received special temporary authority to relocate at the Brickell address in June 1982.[51] This relocation is intended to improve Station KIA 956's signal coverage, particularly within the southern and northeastern areas of Dade County where customers have complained of reception problems. (TR 324; Baker Ex. 7, pp. 2, 5, 10-48; 54-112)

118. Station KIA 956's base station is presently equipped with a solid-state General Electric transmitter, plus its former vacuum-tube transmitter as a back-up. (Baker Ex. 9, p. 35) It was proposed that upon moving to the proposed Brickell Avenue site, BPS would purchase a second new solid-state General Electric transmitter for use as a hot standby transmitter.[52] BPS claims that the presence of a hot standby is necessary to ensure continuous service to the public since Miami is in a lightning belt and since modern solid-state equipment is susceptible to outages from lightning attacks. (TR 326) BPS further noted that the presence of a hot standby will permit regular transmitter maintenance to be performed during normal working hours (when spare parts can be readily obtained) without any loss of service to its customers. (Baker Ex. 9, p. 36)

119. At the time of hearing, Station KIA 956's control point and dispatch center was located at 455 North Flagler Avenue in Homestead, Florida, and was staffed on a 24 hours per day, 7 days per week basis by the operators employed by Southern Answer-Phone, Inc. Connected to the base station by a dedicated leased telephone line, BPS' control point was equipped with a Western Electric switchboard, a Secode manual two-way radio terminal, a Multitone Access 2800 automatic paging terminal[53], a Western Electric speaker, and a lockout device to turn off the base station transmitter in the event of a malfunction. (Baker Ex. 9, pp. 37, 39)[54]

(d) *Classification of Service - Dispatching*

120. As noted, *supra*, Station KIA 956 provides its subscribers with a choice of manual interconnected two-way service, automatic interconnected tone-plus-voice paging service, automatic interconnected tone-only paging service and manual non-interconnected message relay service. (Baker Ex. 9, p. 31)

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[51] Letter of Chief, Mobile Services Division to BPS, June 22, 1982.

[52] The proposal for a hot standby transmitter was the result of a suggestion by communications counsel. No consideration was given to its impact on rates. (TR 324-26)

[53] BPS' Multitone Access 2800 terminal is programmed to store any combination of eight paging messages, whether they be eleven-second tone-and-voice pages or two-second tone-only pages. (Baker Ex. 9, pp. 38-9)

[54] BPS has received authority to relocate the control point and dispatch center of Station KIA 956 to 51 N.W. 29th Street, Miami (BPS Motion For Leave to Amend, March 23, 1981). BPS' office is located at 2931 N.W. 2nd Avenue in Miami. It is equipped with a Motorola Monitor on which BPS employees regularly monitor station activity. It also serves as the site for the replacement or minor repair of paging units. (Baker Ex. 9, pp. 3, 22, 26, 39)

121. BPS has decided not to convert from manual to automatic service notwithstanding the fact that it could serve more customers and be more profitable if it provided automatic service. (TR 347, 458-59) The four advantages which BPS perceives for continued manual operation are: (1) manual service permits both mobile subscribers and their landline correspondents to receive personalized attention; (2) use of the manual mode permits BPS to provide a message holding service for its two-way subscribers; (3) it is possible to impose frequency discipline as a result of monitoring the channel by the mobile operator[55]; and (4) automatic service would not be compatible with the mobile telephones which its subscribers had previously purchased. (Baker Ex. 9, pp. 31-32; Baker Ex. 13, p. 1)

122. Station KIA 956 serves transient subscribers of distant radio common carrier stations while they are temporarily travelling in the Miami area. It will immediately handle emergency calls without prearrangement and will serve non-emergency transient users on a prearranged basis at a charge of 30 cents for each one-minute call (minimum charge of $2.50 per calendar month during period of use). Baker Ex. 9, pp. 15, 33-34)

123. Dispatch service for Station KIA 956's manual interconnected two-way service and its non-interconnected message relay service, plus the monitoring of its control point, is provided on a 24 hours per day, 7 days per week basis by Southern Answer-Phone, Inc.'s (Southern) staff of eleven full-time operators, located in Homestead, Florida. The Southern operator assigned to Station KIA 956's channel also has responsibility for three stations licensed to Southern Radio-Phone, Inc., another company owned by Southern's proprietors, Mr. and Mrs. James Spisiak. During the period 7 a.m. to 10 p.m. one operator handles the four stations. From 10 p.m. to 7 a.m. one operator handles the four stations and the telephone answering service operated by Southern. (Baker Ex. 9, pp. 8, 26-27; TR 293) The Spisiaks are responsible for supervising and training the operators serving Station KIA 956. (TR 303; Baker Ex. 9, p. 26-7) Cox acknowledged that he had not become involved in the day-to-day mechanics of dispatching, since there have been no complaints from subscribers.[56] (TR 354-55)

124. BPS submitted a description of the regulations which govern its common carrier relationships with Station KIA 956's subscribers. These regulations treat the following subjects: the availability of Station KIA 956's service; the provision and repair of rental equipment to subscribers;

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[55] The operator can permit a subscriber to stay on the air as long as necessary in the event of an emergency. (Baker Ex. 9, p. 32)

[56] Should Southern close out its business or suffer a strike, Baker would train its own employees to perform dispatching for its DPLMRS service, obtain a control point and arrange for lines between its base station and control point. (TR 330)

the use and maintenance of the subscriber's own equipment; the extent of BPS' obligation to furnish service; the right of BPS to control use of the mobile transmitters of its subscribers; the responsibilities of subscribers for loss of, or injury to, rental equipment; the liability of BPS for service interruptions and mistakes; the availability of special rates for valued messages; the amount and crediting of advance payments; the right of BPS to require deposits in certain instances and the subsequent crediting and refunding thereof; the length of the minimum initial contract period for subscribers; the right of the subscribers to terminate service; the conditions under which BPS may deny service; and the priorities which govern BPS' provision of service. (Baker Ex. 9, pp. 29-30, 46-54)

125. In addition to Station KIA 956, the following radio common carrier stations presently serve Miami[57] (Baker Ex. 12A, p. 2):

(a) Tel-Car's Station KIB 527, which operates on 152.09 and 152.18 MHz (Tel-Car Ex. 2, p. 13), is presently being converted from the manual to the automatic mode[58] (Tel-Car Ex. 3, p. 10; TR 835, 837).

(b) Tel-Car of Hollywood's Station KUS 267, operating on 152.06 MHz, is presently being converted from the manual to the automatic mode (TR 835, 837; Tel-Car Ex. 2, p. 14).

(c) Radiopaging, Inc.'s Station KSV 895 operates on 454.025, 454.075, 454.125 and 454.225 MHz in the automatic mode (Tel-Car Ex. 3, pp. 13, 20-22).

(d) Air-Beep's Station KKB 693 operates on 454.350 MHz and will operate in the automatic mode if and when it offers two-way service (Air-Beep Ex. 1, p. 1; TR 570-71, 573; Baker Ex. 12, p. 3).

(e) All Florida Communication's Station KIN 643 operates on 454.150 MHz in the manual mode (Baker Ex. 8, p. 3; Baker Ex. 12, p. 4).

BPS argues that when the conversion of the existing Tel-Car and Tel-Car of Hollywood VHF facilities is completed in early 1981, Station KIA 956 will be one of only two Miami radio common carrier channels (VHF and UHF) on which manual interconnected two-way service is available to the public and the only VHF channel on which it will be offered. (Tel-Car Ex. 3, p. 10)

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[57] Southern's Station KLF 537, Florida Radio Phone's Stations KIA 958 and KIG 845, and Gabriel Communication's Corporation's Stations KIR 204 and KFQ 941 serve areas to the north and south of Miami, but do not place a reliable signal into Miami itself or its contiguous suburbs. (Baker Ex. 12A, p. 2)

[58] BPS contends that Station KIA 956 is the only Miami facility on which the VHF manual equipment owned by Station KIB 527's existing manual subscribers can be used. It further contends that conversion of the 152.15 MHz channel by Air-Beep or Tel-Car to an automatic system would preclude Tel-Car's existing Station KIB 527 subscribers from using or selling their present VHF manual equipment in Miami.

(e) *Maintenance*

126. Station KIA 956's base station is presently maintained by BPS' two-man maintenance staff, with backup assistance from Caribbean Radio Communications, Inc. (Caribbean), an independent Miami service contractor. (Baker Ex. 9, p. 16)

127. BPS' maintenance staff consists of Messrs. William Price and Bobby A. Gloyd. Gloyd, a resident of Perrine, Florida and the holder of a second class FCC license for approximately eighteen years, performs the major part of the maintenance work for Station KIA 956 and is assisted whenever necessary by Price.[59] Gloyd and Price are headquartered at BPS' maintenance shop, 4530 N.W. 7th Avenue, Miami, which is approximately three miles and five to ten minutes driving time from its proposed Brickell Avenue base station site. BPS' staff performs a regular bi-monthly maintenance check on the base station and also regularly monitors the channel from the service shop. It is on call 24 hours per day, 7 days per week for emergency repairs. (Baker Ex. 9, pp. 16-19)[60]

128. In the event that BPS' maintenance staff cannot be reached for any reason, the 15 technician staff of Caribbean's Miami shop provides back-up emergency service on a 24 hours per day, 7 days per week basis. Caribbean's Miami shop is located at 7246 N.W. 25th Street, approximately 10 miles and 25 minutes driving time from both Station KIA 956's existing site and its proposed Brickell Avenue site. Caribbean has a fleet of 12 fully-equipped service vehicles. (Baker Ex. 9, pp. 19-20)

129. Station KIA 956's control point is maintained by Communications Maintenance, Inc. (CMI), whose shop and six licensed technician staff is located in the same Homestead, Florida building as the control point. The facility is maintained by CMI on a 24 hours per day, 7 days per week basis. (Baker Ex. 9, p. 21)

130. Maintenance of two-way mobile telephone equipment leased by BPS subscribers is performed at Caribbean's Miami, Dania and Florida City service shops. At the time of hearing, BPS had obtained authorization as a Motorola National Service Organization and was scheduled to begin servicing mobile equipment at its Miami shop in early 1981. (Baker Ex. 9, pp. 19-21; TR 375)

131. Customers requiring maintenance service for tone-plus-voice and tone-only paging equipment bring their units to BPS' office at 2931 N.E. 2nd Avenue in Miami. BPS employees make repairs on the spot or, if

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[59] Price and Gloyd were hired on the advice of communications counsel after adoption of the designation order. Gloyd resigned as of August 7, 1981 and was subsequently rehired.

[60] Also BPS Statement, November 6, 1981; BPS Petition For Leave to Amend, July 20, 1980.

major work is necessary, replace the malfunctioning unit with a pager from inventory. (Baker Ex. 9, p. 22)

(f) *Coverage*

132. Station KIA 956 currently serves approximately 1,326,769 persons in an area of approximately 470.79 square miles, and will serve approximately 1,429,073 persons in an area of approximately 782.79 square miles if its pending modification proposal is granted. (Baker Ex. 10, pp. 2-6)

(g) *Traffic and Need*

133. Over the years, the mix of subscribers on Station KIA 956 has changed as follows (Baker Ex. 9, p. 7):

Year	*Interconnected Two-Way Mobile Units*	*Paging Units*	*Message Relay Units*
1969	0	0	58
1970	0	0	45
1971	0	0	25
1972	0	0	18
1973	0	0	12
1974	0	0	9
1975	42	29	7
1976	52	111	7
1977	60	268	5
1978	56	460	3
1979	43	618	3

As of November 30, 1980, Station KIA 956 was serving 43 two-way units of which one unit was assigned to an employee of an affiliated organization. There were approximately 640 tone and voice pagers of which approximately 24 were assigned to affiliates. (TR 300) In addition, service was being provided to 59 tone only pagers and to three message relay units. Five of the tone only pagers were used by affiliated subscribers but none of the message relay units were with affiliates. At the beginning of February, 1981, there were 46 two-way units and ten more orders from people awaiting equipment delivery which would bring the total up to approximately 56 units. (TR 318)[61]

134. In order to demonstrate the extent of the utilization of the frequency by Station KIA 956's subscribers, a traffic load study of the actual time the station was in service[62] was conducted on October 23, 24

[61] As of February, 1981, Station KIA 956 was serving approximately 750 pagers. (TR 318-19) Those requesting new paging service were being placed on a waiting list. (TR 345)

[62] The Baker employee conducting the survey counted and recorded only the exact amount of time that the station was in use. (Baker Ex. 5, pp. 1-3)

and 27, 1980[63]. (Baker Ex. 5, p. 1) The study yielded the following results[64] (Baker Ex. 5, pp. 4-6):

	Thursday 10/23/80	*Friday 10/24/80*	*Monday 10/27/80*
Total Time in Use:	357:33	376:20	388:04
Busiest Hour:	41:55 (2-3 PM)	46:50 (11-12N)	48:31 (4-5 PM)
Least Busy Hour:	8:16 (7-8 AM)	4:56 (7-8 AM)	15:10 (7-8 AM)
Hours In Use Over 30 Minutes:	8 of 12	8 of 12	8 of 12
Average Hourly Use: [65]	29:48	31:21	32:20

135. The study disclosed that the vast majority of channel use was by pagers. Two-way subscribers, during the same twelve-hour period, used the channel 58 minutes and 5 seconds on October 23, 55 minutes and 16 seconds on October 24, and 49 minutes and 1 second on October 27. Baker has never conducted a study to ascertain how it could maximize use of its channel. (Baker Ex. 5, pp. 4-6; TR 349, 351, 377)

136. Baker has not promoted two-way service since 1976. Cox explained that promotion of two-way service would ". . . create a market for something that didn't exist." It was Cox's understanding that Baker's license permits operation of up to 75 mobile units. No one has been denied access to two-way service.[66] While a fully automatic two-way service would permit additional two-way customers to utilize the channel, BPS has not automated on the premise that its existing customers prefer a more personalized manual service. However, Baker did not conduct a study to ascertain its customers' preferences and offered no evidence supporting the premise that its customers prefer manually interconnected two-way service over fully automatic service. (TR 302-03, 338, 347, 349, 401, 458-59)

137. When the channel is in two-way use, pagers cannot access the channel. After the two-way use is ended, the stored paging messages can be accessed by the dispatch personnel. Cox did not know whether Southern operators give priority to stored paging messages or to two-way service also waiting to access the channel. While two-way users have complained about the difficulty in accessing the channel because of heavy pager use, no two-way user has discontinued service with the complaint that the channel was being occupied too much by pagers. (TR 319-20, 345, 403-04)

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[63] The days selected were representative days on which the station was used in a normal manner. (Baker Ex. 5, p. 1; TR 400, 405-07)

[64] All times are in minutes and seconds.

[65] Average hourly use was calculated by dividing the total time the channel was in use each day by 12.

[66] BPS intends to limit the number of pagers to 750.

138. As noted, *supra*, the operators for the Baker manually interconnected system are instructed to interrupt a two-way conversation after three minutes and request that conversations be concluded as quickly as possible. This is done during busy times of the day. Cox did not identify when such "busy times" occur. Moreover, the traffic studies conducted by BPS do not establish a pattern of heavy two-way use necessitating interruption. The studies reveal that, on October 23, two-way users occupied the channel for 12 minutes 13 seconds from 11:00 a.m. to noon, 7 minutes 22 seconds from 2:00 p.m. to 3:00 p.m., and that no other hourly segment, from 7:00 a.m. to 7:00 p.m., was used by two-way subscribers for more than 5 minutes 30 seconds. Two-way usage patterns were similar on October 24 and October 27, with no hourly segment used more than 9 minutes 28 seconds on October 24 and, with the exception of one 11-minute-5-second segment from 3:00 p.m. to 4:00 p.m., no more than 6 minutes 39 seconds in any hourly segment on October 27th. (Baker Ex. 9, p. 32; TR 293; Baker Ex. 5, pp. 4-6; TR 377) During the course of BPS' traffic load study for Station KIA 956 and Tel-Car's traffic load studies for Stations KIB 527, KUS 267 and KSV 895, the average duration of individual two-way calls was over one minute but less than two minutes. (Baker Ex. 5, pp. 4-6; Tel-Car Ex. 3, pp. 23-41, 68-69)

139. In order to determine need for service within the increased area to be served as a result of its proposed license modification, BPS conducted a mail survey of its existing subscribers in November and December, 1980. Respondents were shown a map depicting the 37 dbu reliable service contours of both BPS' existing and its proposed Station KIA 956 facility. They were then asked, *inter alia*, how often they travelled within the new areas to be served by the modified facility and whether they would subscribe to additional units if Station KIA 956's service area was so enlarged. (Baker Ex. 7, pp 1-2, 6-8)

140. Of the 39 subscribers who responded to Baker's survey, 35 indicated that they travel within the additional new service area and 20 of these respondents declared that they travel within the new area at least once a day. If Station KIA 956's service area is modified, as proposed, 12 existing subscribers responded that they would subscribe to 17 additional two-way units while 15 existing subscribers indicated that they would subscribe to 30 additional paging units.[67] (Baker Ex. 7, pp. 2-3)

2. *Air-Beep of Florida, Inc. (Air-Beep)*

(a) *Ownership, Management and Personnel*

141. Air-Beep is a corporation owned equally by David H. Smith (Smith) and Samuel Kaye (Kaye). Smith is President, Chief Executive

[67] BPS has not conducted any surveys to determine subscriber preference for or against manual interconnected two-way service. (TR 246, 302)

Officer and a director of Air-Beep. Kaye is Executive Vice President, Secretary and Director. Maureen Smith, wife of Smith, is Air-Beep's Treasurer as well as director. Barbara Goodman is Air-Beep's Vice President of Operations. (AB Ex. 1, p. 1; TR 523; AB Ex. 2; TR 609; AB Ex. 3; TR 643; AB Ex. 4; TR 709)

142. Smith and Kaye propose to devote approximately 30 hours per week to Air-Beep's proposed facility and Smith will be available on call. Maureen Smith will devote about 30 hours weekly to the operation. (AB Ex. 1, pp. 5-6; TR 523; AB Ex 2; TR 609; AB Ex. 3; TR 643)

143. Air-Beep personnel will report to Smith, or in his absence to Kaye. Smith, who lives approximately a half-hour drive from Air-Beep's office, will be in charge of Air-Beep's day-to-day operations and will superintend relations with Air-Beep's maintenance contractors. (AB Ex. 1, p. 5; TR 523)

144. Smith has more than 18 years of experience managing and operating Radio Common Carrier (RCC) stations. Beginning in 1962, Smith was the contractor for National Mobile Radiophone, a Cleveland-based paging service. As a contractor, Smith's responsibilities included selling and renting paging units, collecting monies and delivering the units to customers after maintenance and repair. Smith owns a Milwaukee-area answering service doing business as Answerphone or Greater Milwaukee, which has been providing management services to RCC stations since 1972. (AB Ex. 1, p. 7; TR 523, 567)

145. Smith, who resides from 9 to 11 months per year in Fort Lauderdale, Florida (TR 568-69), presently devotes time to a number of other businesses, including Air-Beep's Miami facility on 454.350 MHz (20 to 30 hours per week), his Sussex, Wisconsin DPLMRS facility (20 to 25 hours per week), his Milwaukee telephone answering service (5 hours per week), his Miami telephone answering (1.5 hours per week), Chicago and Western Corporation (2 hours per week) and Rida Associates (2 hours per week). Smith has also made commitments of time to his proposed new paging station and his proposed new two-channel UHF mobile telephone facility in the Milwaukee area, plus the twelve-channel 470-512 MHz facility to be shared by Air-Beep and others in the Miami area. (TR 560-62, 563-64; 570)

146. Kaye, who lives approximately five minutes from Air-Beep's office, has marketing and sales experience gained, in part, through his management of A-1 Answering Service, a Coral Gables, Florida telephone answering service. Kaye speaks fluent Spanish and intends to market Air-Beep's services to the Miami-area Hispanic community. Kaye is familiar with the operation of paging units and will familiarize himself with two-way equipment. Kaye will insure that Air-Beep sales personnel are conversant with the use of equipment and its performance capabilities. He

will have broad responsibilities for inventory control and will insure that Air-Beep customers possess appropriate equipment in proper working condition. (AB Ex. 2; TR 609, 617-19, 628-30) Kaye devotes 10 to 15 hours a week to his Miami telephone answering service and 30 hours a week to Air-Beep's channel 34 facility. (TR 615-17)

147. Maureen Smith has more than 33 years of experience with RCC operations. Commencing in 1946-1947, she performed dispatch functions for one of the country's first RCC stations, Brooklyn-based Station KEA 260. In 1952, she acquired an interest in a Miami-area RCC facility, Station KIE 367, for which she performed management and dispatch functions. In 1963-1964, Maureen Smith acquired Station KQC 881, Cleveland, Ohio. Prior to that time, she had performed management and dispatch functions in conjunction with that station. In 1972, she became the licensee of Milwaukee-area Station KRS 715 and in 1977, became the licensee of another Milwaukee RCC facility, Station KWU 262. She has been active in the management and operation of RCC stations licensed to her and will be active in Air-Beep's operation on 152.5 MHz (Channel 19), devoting 30 hours per week. (AB Ex. 3; TR 643)[68] However, she and her husband have had relatively little experience in providing commercial two-way service. (TR 571-76, 652, 678-80)

148. Barbara Goodman, Air-Beep's Vice President of Operations, will be responsible for Air-Beep's overall operations, subject to Maureen Smith's supervision and direction. From 1972, Goodman was in charge of the overall operations of Maureen Smith's Milwaukee-area station. Goodman's responsibilities included supervision of inventory, sales, maintenance, billing and the technical aspects of the operation. Goodman holds a Third Class Radiotelephone Operator's license, for which an examination was administered by the Commission. Goodman is a qualified electronics technician and will return to school for additional training so as to obtain a Second Class Radiotelephone Operator's license. (AB Ex. 4; TR 709)

149. Air-Beep will establish a system, for handling complaints on a fair and prompt basis. Complaints will be reviewed by Goodman, who will take appropriate action. (AB Ex. 1, pp. 5-6; TR 523)

150. Smith is a member of the Wisconsin Radiotelephone Association. Air-Beep is a member of the Florida Association of Radio Common Carriers. Smith also is a member of Telocator, the national association of radio common carriers. Air-Beep intends to use meetings and association-sponsored programs to train new personnel and as part of a continuing education program for personnel. (AB Ex. 1, p. 6; TR 523)

[68] Maureen Smith devotes 5 hours a week to her Miami Telephone Answering Service and a minimum of 1 hour a day to her Milwaukee stations. (TR 657, 661)

151. Since December, 1980, Air-Beep has been the licensee of DPLMRS Station KKB 693 on 450.350 MHz (Channel 34) in Miami. (TR 539, 711) Air-Beep and others have been granted a construction permit for shared use of a 12-channel two-way mobile telephone system in the 470-512 MHz band in the Miami market. (TR 536-37) Additionally, Air-Beep has applied for new one-way paging stations on 35.46 MHz at Miami (Air-Beep Petition for Leave to Amend, November 30, 1981), and on 35.34 MHz at Orlando, Florida (Air-Beep Petition for Leave to Amend, December 10, 1981). Air-Beep is a ten percent partner in Florida Cellular Telephone Company, an applicant for a new Domestic Public Cellular Radio Telephone Service system at Miami, Florida. (FCC Public Notice, mimeo 4689, June 18, 1982)

152. David H. Smith is the licensee of DPLMRS Station KUC 977, which operates on 152.18 MHz at Sussex, Wisconsin, with a second transmitter site at Milwaukee, Wisconsin (TR 542-44) Smith is also an applicant for a low-band paging facility and two UHF band two-way channels in the Milwaukee area. (TR 563-64)

153. Maureen Smith, Air-Beep's Treasurer and Director, is the licensee of a one-channel paging facility, Station KRS 715, and a two-channel UHF two-way facility, Station KWU 262, in Milwaukee, Wisconsin. (AB Ex. 3, p. 1; TR 647-48)

154. Since 1976, David H. Smith has been the sole owner of Station KUC 977, Sussex, Wisconsin, which is licensed to operate on two-way frequency 152.18 MHz (Channel 11). During this period, Smith has never filed with the Wisconsin Public Service Commission the tariff which must be approved before Station KUC 977 can provide two-way service.[69] TR 544-45, 576, 580, 596) Smith's annual reports (FCC Forms L) for Station KUC 977 for the years 1977, 1978, and 1979 show that the station served only paging subscribers[70] during those years and that its 152.18 MHz base station was listed as a "signalling or paging" facility rather than a "general" (two-way) facility. (Baker Rebuttal Exs. 1, 2, 3)

155. Smith maintained that Station KUC 977 has never filed the requisite state tariff nor offered commercial two-way service because it could not provide a clear signal in downtown Milwaukee, more than 19.8 miles away.[71] According to Smith, this was due to the topography between his mountaintop base station at Sussex and Milwaukee, topography which apparently includes a gulley and "an area which is tough to get through".

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[69] At hearing, Smith claimed that he was "in the process now of requesting and filing [his] tariffs with [sic] the Milwaukee area, when these proceedings are over." (TR 583)

[70] Station KUC 977 served 110 paging units at the end of 1977, 117 paging units at the end of 1978 and 168 paging units at the end of 1979. (Baker Rebuttal Exs. 1, 2, 3)

[71] Smith testified that three mobile units were presently using Station KUC 977 on a noncommercial testing basis - two "in-house" units and one unit belonging to an individual whose name Smith did not recall. (TR 593-94)

He claimed that he had been testing the channel for over five years pursuant to a "special permit" which had been "granted in conjunction with the public service commission and the telephone company". He maintained that Station KUC 977's problems have now been solved by receipt of authorizations for a second transmitting site on 152.18 MHz in Milwaukee. (TR 575-76, 579-80, 581-83)

156. Smith did not explain what prevented him from filing the requisite state tariff and offering two-way service in an around Sussex, an area where he acknowledged his signal to be "sensational." Smith had represented to the Commission during the processing of his original Sussex application that there was significant need for two-way service in the Sussex area. (TR 547-48, 580)

157. Since 1977, Maureen Smith has been the licensee of Station KWU 262, Milwaukee, Wisconsin, which is authorized to operate on two-way frequencies 454.150 MHz (Channel 26) and 454.350 MHz (Channel 34). (AB Ex. 3, p. 1; TR 648-49, 691) Mrs. Smith's annual reports (FCC Forms L) for 1977, 1978 and 1979 indicated that Station KWU 262 served only paging subscribers and list both of its assigned two-way base stations as "signalling or paging" facilities. (Baker Rebuttal Exs. 4, 5, 6; TR 673)[72]

158. Mrs. Smith claimed that interference in the downtown Milwaukee area was the reason why Station KWU 262 had no paying two-way subscribers. She did not know whether other Milwaukee operators were having similar difficulties.[73] She did not know when she notified the Commission that she was experiencing such interference problems, other than that she had spoken to Mr. Guttman, a member of the Commission's staff.[74] (TR 699) Mrs. Smith explained that a Secode terminal was being installed and that she believed this equipment would cure her interference problems. (TR 673-74, 681-83, 684-89, 693-94, 699, 704)

159. On December 4, 1980, Air-Beep was granted a license for a two-way facility of 454.350 MHz in Miami[75]. At the time of hearing, Air-Beep was not serving mobile units on the station, but had already put approximately 325 pagers into service. Air-Beep had advised the Commis-

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[72] Maureen Smith's FCC Form L reports for the years 1977, 1978 and 1979 are combined reports for Station KWU 262 and for Station KRS 715, Milwaukee, which operates on a one-way channel. (Baker Rebuttal Exs. 4, 5, 6; TR 648) Despite the fact that Station KWU 262 is licensed for two two-way channels, the service data portion of Mrs. Smith's FCC Form L's show "3" "signalling or paging" base stations in service (rather than the 1 paging base station and 2 general (two-way) base stations assigned to her) and show the following numbers of "signalling or paging" units served: 1050 (1977), 1785 (1978), and 2906 (1979). (Baker Rebuttal Exs. 4, 5, 6)

[73] Smith, on the other hand, claims that the signal from Station KUC 977's new Milwaukee transmitting site is a "great signal". (TR 581)

[74] Sheldon M. Guttmann became Acting Chief of the Commission's Mobile Services Division on October 10, 1979, approximately two years after Mrs. Smith's station was licensed.

[75] Air-Beep shares this channel with Southern Radio-Phone, Inc. (TR 571-72, 585-86)

sion in its covering license application that its Miami facility was ready for operation. Smith explained that two-way units could not be served because of a delay by the telephone company in supplying lines and equipment. Air-Beep contemplates that its 454.350 MHz facility will eventually serve 50 to 60 two-way units and 700 to 1,000 pagers and that the 152.15 MHz facility, which it seeks in this proceeding, will be loaded in a similar manner. (TR 472, 564-65, 571-72, 587, 637)

(b) *Service and Charges*

160. Air-Beep's proposal Channel 9 facility will offer the following services: (1) two-way mobile communications; (2) tone-plus-voice signalling service; and (3) tone-only signalling service. (AB Ex. 1, p. 1; TR 523; AB Ex. 9; TR 531)

161. All these services will be fully automatic and interconnected. Two-way service is provided with a "lockout" system, which maximize privacy to subscribers by preventing another subscriber from listening to or interfering with communications merely by picking up its mobile unit. There also is an automatic "drop-out" device which is designed to optimize use of the channel. The device terminates a communication automatically after a specific duration. The duration after which the "drop-out" will activate is adjustable. Initially, Air-Beep intends to set the device to activate after a three-minute duration. Prior to its activation, there is a 15 second lead tone alerting the user to the impending cut-off. (AB Ex. 1, pp. 1-2; TR 523)

162. Air-Beep intends to give priority to two-way communications and has provisionally determined that the facility could accommodate approximately 60 to 70 mobile units and between 700 to 1,000 paging units. Air-Beep, which will vigorously promote both two-way and one-way service through advertisements in the yellow pages, in newspapers and on radio and television, will promote two-way operation and will limit paging units, if necessary, in order to accord priority to two-way users. (TR 589-90; 635-40)

163. Air-Beep's proposed rates are as follows (AB Ex. 9):

TWO-WAY MOBILE RADIO TELEPHONE SERVICE

FULLY AUTOMATIC TERMINAL SERVICE	$55.00
Unlimited 1 minute calls	
Calls in excess of 1 minute	
25¢ per minute	
Automatic drop cut at end of 3 minutes	

Equipment will be system-compatible, customer-owned.

VOICE PAGERS

RENTAL RATES PER MONTH Includes 100 pages, 10¢ per each over 100	35.00
Deposit Insurance required to cover loss or theft of unit	150.00
SELF-OWNED UNITS - PER MONTH Includes 100 pages, 10¢ per each 100	30.00
RENTAL RATE PER MONTH (First Pager)	20.00
Additional Unites	18.00
Deposit Insurance required to cover loss or theft of unit	50.00
SELF-OWNED UNITS - Per Month	12.50

(AB Ex. 9)

(c) *Facilities and Equipment*

164. Air-Beep's fully automatic system will use "state of the art" equipment. Two-way communications will be accomplished using a Secode SMART System. A BBL Systems III terminal will be used for paging. To accomplish two-way mobile communications, a subscriber directly can dial another mobile unite or landline telephone facility from a mobile unit without any operator assistance. A landline telephone facility directly can dial a mobile unit without any operator assistance. When the channel is being used for two-way communication, the SMART system will create a "busy" signal for the BBL terminal, thereby preventing a pager from interfering with the communication. (AB Ex. 1, p. 1; TR 523)

165. For paging purposes, each pager unit will be assigned a seven-digit number. A pager unit can be activated by simply dialing its number. If the channel already is in use for a two-way or one-way communication, the message will be stored in the BBL terminal until the channel becomes available. As soon as the channel is free, the message will be transmitted. The BBL terminal has a 64-unit storage capacity and is designed to create a "busy" signal for the SMART system when it is in use in order to prevent intereference from subscribers. (AB Ex. 1, p. 2; TR 523)

(d) *Classification of Service*

166. As noted, *supra*, Air-Beep proposes a fully automated system. Counsel for BPS argued that this constituted a variance from its application, citing the response to Item 5 of FCC Form 401, which represented that it would be a manual system. (TR 763-73) The Presiding Judge, however, ruled that an amendment was not required and that proposing an automatic system did not constitute a variance. (TR 744) However, the Presiding Judge made clear that, under the circumstances,

he would not entertain the argument that a preference should accrue because an automatic system was superior to a manual system. (TR 774-75)[76]

(e) *Maintenance*

167. Base and mobile unit maintenance will be provided by Communications Systems (Communications), which is located at 5521 N.W. 78th Avenue in Miami. Chatco Communications, Inc. (Chatco), located at 5375 N.W. 74th Avenue in Miami, will maintain and repair all paging units. Communications will give priority to base station maintenance and repair. Both Communications and Chatco have licensed maintenance operators on duty or on call 24 hours a day, seven days a week. (AB Ex. 1, p. 2; TR 523; AB Ex. 5; TR 525; AB Ex. 6; TR 527)

168. Subscribers will bring their mobile units into Communications office and their paging units to Chatco's office for maintenance and repair. The location of these two contractors, in central Miami, will afford subscribers access to the maintenance shops from any part of the Miami area. Maintenance will be available to subscribers during the normal business hours of the maintenance contractors, from approximately 8:00 a.m. to 6:00 p.m., Monday through Friday. In addition, subscribers can exchange malfunctioning or defective paging units at any of six satellite offices throughout the Miami area. These offices are run by Answerphone of Greater Miami, which is owned by Smith. (AB Ex. 1, p. 3; TR 523; AB Ex. 5; TR 525; AB ex. 6; TR 527; TR 507-08)

169. Communications, which has been in business since 1955 and is an authorized service center for RF Harris and General Electric radio equipment, is directed by Norman Ginsburg, who has held a Second Class Radiotelephone Operator's license since 1960. Communications has no fewer than three holders of Second Class Radiotelephone Operator's licenses or better on call at all times. Communications performs maintenance and repair work on radio equipment used by the United States Border Patrol, Florida Department of Law Enforcement, the Internal Revenue Service Criminal Intelligence Division, as well as other municipalities and government agencies. (AB Ex. 1, pp. 3-4; TR 523, AB Ex. 5; TR 525)

170. Chatco is directed by Sam Chataway, who has held a Second Class Radiotelephone Operator's license since 1963. Chatco has been in business since 1963 and is an authorized service and maintenance center for General Electric radio equipment. Chatco, which performs maintenance and report work for Hialeah Police Department and other govern-

[76] If the change from a manual to automated system could be construed as having some decisional significance, then it was incumbent upon an applicant to have filed a timely amendment, pursuant to Section 1.65 of the Rules, 47 CFR 1.65.

mental agencies on a contract basis, has no fewer than three holders of Second Class Radiotelephone Operator's licenses or better on call twenty-four hours a day, seven days a week. (AB Ex. 1, p. 4; TR 523; AB Ex. 6; TR 527)

(f) *Coverage*

171. Air-Beep is presently operating Station KKB 693 on 454.350 MHz (Channel 34) on a shared arrangement with Southern Radio Phone, Inc.'s Station KLF 537. (TR 564; Baker Ex. 12A, p. 2)[77] Station KKB 693 will also be automated when the telephone company supplies equipment. (TR 486) The service of the proposed station will be approximately coextensive with the channel 34 service. (TR 555-556) It is predicted that the service proposed in the application would reach approximately 1,533,571 persons in an area of approximately 887 square miles. (AB Ex. 10, p. 4)

(g) *Traffic and Need*

172. As noted, *supra*, Air-Beep has been granted a license to operate on the 454.350 MHz frequency (Channel 34) in Miami. (TR 711) At the time of hearing, the station was providing paging but not two-way service. (TR 539, 564, 632, 634)

173. At hearing, Air-Beep introduced no traffic load study, no survey of the local public and no other evidence relating to the question of need for its proposed 152.15 MHz service. It presented no evidence concerning the steps, if any, it would take to accommodate Station KIA 956's existing subscribers nor did it introduce evidence to indicate how its Channel 34 operation or its shared proposal in the band 470-512 MHz would impact on its need for the subject facility.

3. *Tel-Car Corporation (Tel-Car)*

(a) *Ownership, Management and Personnel*

174. Tel-Car is a Florida corporation with principal offices in Miami, Florida. It is owned by Digital Paging Systems, Inc. (Digital), a subsidiary of Graphic Scanning Corporation (Graphic), a publicly held corporation. Both Digital and Graphic are engaged in telecommunications and are headquartered in Englewood, New Jersey. (Tel-Car Ex. 3, p. 1)

175. Tel-Car is the licensee of two radio common carrier facilities in Miami: Station KIB 527, which operates on VHF two-way frequencies 152.09 MHz and 152.18 MHz, and Station KRM 961, which operates on one-way frequency 152.25 MHz from several transmitting locations. (Tel-Car Ex. 3, pp. 3, 12; Tel-Car Ex. 2, pp. 8-12) A commonly owned corporate

[77] Air-Beep's proposed base station will be located at 100 North Biscayne Boulevard in Miami. Air-Beep's Secode terminal for its 454.35 MHz Miami station is to be located at the facilities of Southern Radio Phone, Inc. in Homestead, Florida. (TR 571)

affiliate, Radiopaging, Inc., likewise operates two Miami radio common carrier facilities: Station KSV 895, which provides an automated UHF two-way mobile telephone service on 454.025 MHz, 454.075 MHz, 454.125 MHz and 454.225 MHz and Station KIE 367, which provides paging service on 43.58 MHz from several Miami locations. (Tel-Car Ex. 3, pp. 12-13; Tel-Car Ex. 2, pp. 16-19, 20-22) A second commonly owned corporate affiliate, Tel-Car of Hollywood, Inc., serves the Miami area as the licensee of two radio common carrier facilities in nearby Hollywood, Florida: Station KUS 267, which offers two-way service on 152.06 MHz and Station KUS 268, which offers paging service on 158.70 MHz. A third Tel-Car affiliate, Aerophone, Inc., is the licensee of an air-ground DPLMRS facility in Miami. (Tel-Car Ex. 3, pp. 2-3, 14)

176. Tel-Car is also the permittee or licensee of DPLMRS facilities at Fort Pierce, Melbourne, Gainesville and Zubert, Florida. (Tel-Car Ex. 3, pp. 4-5; TR 909-10) A corporate affiliate also serves as the licensee of five DPLMRS channels at West Palm Beach, Florida. (TR 735-37) As noted, *supra*, Tel-Car and others have been granted a construction permit for shared use of a 12-channel two-way mobile telephone system in the 470-512 MHz band in the Miami market. (TR 877) It is also an applicant for new two-way DPLMRS facilities at Melbourne and Fort Pierce, Florida and for new paging stations at Orlando, Pensacola, North Fort Myers, Melbourne, Daytona Beach and Lakeland, Florida. (TR 738-39)

177. Tel-Car's parent companies also own or control licensed DPLMRS stations at Los Angeles and Sacramento, California; Cleveland and Toledo, Ohio; New York and Buffalo, New York; Newark and Atlantic City, New Jersey; Dallas and Houston, Texas; McKeesport, Pennsylvania; Chicago, Illinois; St. Louis, Missouri; and Detroit, Michigan. Tel-Car's parent companies also hold various licenses in the Multipoint Distribution Service, Specialized Mobile Radio Service and Business Radio Service. (Baker Rebuttal Ex. 7, pp. 7-8)

178. At the time of the hearing, June Cockran had been Tel-Car's General Manager[78]. (Tel-Car Ex. 3, pp. 1-2) Mrs. Cockran supervised all aspects of Tel-Car's Miami operations, including administrative, sales and technical. She was assisted by a staff of approximately 68 full-time employees, including an office manager, a radio room supervisor, an accounting department manager, a collection manager, a station engineer, six operators[79], eight accounting department personnel and eleven technical department employees. (Tel-Car Ex. 3, p. 4; 6-8; TR 731)

[78] Cockran left Tel-Car's employ on May 1, 1982. She was replaced by Louis Parchman, who did not testify in this proceeding and the record is silent as to his experience or qualifications. (Tel-Car Motion For Leave to File Statement, April 26, 1982)

[79] Tel-Car's operators will have no role in its automatic system. (TR 904)

179. In addition to the proposed Channel 9 facility, Mrs. Cockran and her staff were responsible for the operation of the existing Miami area facilities of Tel-Car, Tel-Car of Hollywood, Inc., Radiopaging, Inc. and Aerophone, Inc. (Tel-Car Ex. 3, pp. 4-5).[80] These include Tel-Car's Stations KIB 527 (2 base stations, 70 two-way units and 510 pagers) and KRM 961 (five base stations, 13,000 pagers); Tel-Car of Hollywood, Inc.'s Stations KUS 267 (one base station, 100 pagers) and KUS 268 (one base station, 86 two-way units)[81]; Radiopaging, Inc.'s Stations KSV 895 (four base stations, 244 two-way units) and KIE 367 (four base stations, 900 pagers); and Aerophone, Inc.'s air-ground Station KWT 946. (Tel-Car Ex. 3, pp. 9, 12, 13, 14; Baker Rebuttal Ex. 7, pp. 4, 5, 7)

180. In addition, Mrs. Cockran had been given responsibility for coordinating the establishment of a new paging station at Fort Pierce, Florida (Tel-Car Ex. 3, pp. 4-5) and also had responsibilities for developing stations in Melbourne, Gainesville, and Zubert, Florida, where Tel-Car holds construction permits. (TR 909-10) Finally, if eventually authorized, Mrs. Cockran was to have had overall supervisory responsibilities with respect to stations for which Tel-Car has applied at Orlando, Pensacola, North Fort Myers, Daytona Beach Shores, Lakeland and Fort Pierce, Florida. (TR 738-39, 874-76)

(b) *Service and Charges*

181. Tel-Car proposes to charge the following rates for its proposed service (Tel-Car Ex. 3, p. 90):

A. Rental of unit-selective-unit.	$19.90 per month
B. Maintenance of mobile equipment-per unit	7.00 per month
C. For the first 80 calls, or any portion thereof per month.	
1. First Unit	20.50 per month
2. Second unit to same subscriber	19.50 per month
3. Any units thereafter to same subscriber	18.50 per month per unit
D. For telephone interconnection (3 minutes)	5.00 per month per unit
E. Multi-channel service	10.00 per month per channel
F. Any calls over 80 per month, per unit	.15 per call

[80] Ann Meuse handles service and billing complaints. Richard Friehofer, Tel-Car's Station manager, is responsible for maintenance of the transmitters an approximately 15,000 pagers. (Tel-Car Ex. 3, pp. 6-8; TR 814, 830)

[81] Since Tel-Car Exhibit 3 does not indicate the number of units served by Station KUS 267, the figure provided in Tel-Car's response to Baker's interrogatories is used (Baker Rebuttal Ex. 7, p. 5). In all other instances, the numbers of units served are set forth in Tel-Car Exhibit 3 while the number of base stations is provided by Baker Rebuttal Exhibit 7.

G. Any calls over 3 minutes or any portion thereof	.15 per call
H. Selective signaling on subscriber-owned equipment	3.00 per month per unit

182. Tel-Car is presently charging a rate of $28.50 to $30.50 a month[82] for manual direct-dial two-way service over Station KIB 527, with which it proposes to trunk the proposed channel. (TR 826, 833-34) In six months or so, Tel-Car will begin charging subscribers to its planned three-channel VHF automatic system a monthly rate of $32.-0 for 120 minutes of airtime, plus 20 cents for every additional minute thereafter. (TR 832-34) This new automatic service rate is designed to penalize persons who do not use their radios by charging them a high rate for the service but does not charge those who are using up all the airtime. (TR 836)

183. Tel-Car intends to provide automatic units to customers who wish to lease their equipment but has made no decision as to what its rental charge will be for automatic units. (TR 870-72)

184. Tel-Car's three-channel automatic system will consist of Station KIB 527's present 152.09 and 152.18 MHz channels and Tel-Car of Hollywood's existing 152.06 MHz channel. (TR 837) If Tel-Car is successful herein, the subject 152.15 MHz channel will be trunked with these channels to form a four-channel VHF automatic system. (TR 837-38, 840) But the system proposed would not fully utilize the efficiencies of trunking for a number of reasons. (TR 902) First, not all customers would be required to utilize units capable of operating on all four frequencies. In addition, although the three KIB 527 frequencies, as proposed, would be coterminous with each other, they would not be coterminous with the Tel-Car of Hollywood frequency. (TR 845) Finally, the frequency proposed in the present application would be limited to two-way use while the other frequencies would also be used to provide paging service, which might further reduce the benefits of trunking. (TR 904)

(c) *Facilities and Equipment*

185. Tel-Car's proposed 152.15 MHz base station will be located at 2 South Biscayne Boulevard in Miami. It will use a single Motorola transmitter. (Tel-Car Ex. 1A, p. 1)

186. Tel-Car's control point will be situated in the Congress Building, 111 N.E. 2nd Avenue, Miami, a few blocks west of the base station. A Secode terminal will serve as the facility's means of interconnection. Tel-Car's offices are also located in the Congress Building. (Tel-Car Ex. 3, pp. 1 and 3; Tel-Car Ex. 4, p. 1)

[82] These charges entitle existing Station KIB 527 subscribers to 80 three-minute calls, selective signalling and the capability of dual-channel use. (TR 827)

(d) *Classification of Service*

187. As noted, *supra,* Tel-Car would add Channel 9 to its existing DPLMRS Station KIB 527, Miami. The transmitter will be located on the roof of One Biscayne Tower in downtown Miami. KIB 527 transmits from the Congress Building, which is close to the new site.[83] KIB 527 transmits on two VHF channels, Channels 5 and 11. (Tel-Car Exs. 1 and 1(a); Tel-Car Ex. 3, pp. 2-3) The proposed three-channel, Miami-based trunked system will serve mobiles and pagers. However, Channel 9 will be dedicated to mobile service. (Tel-Car Ex. 3, pp. 3, 11; TR 843) Additionally, Miami-area users whose radios are equipped with an appropriate crystal will be able to place and receive calls over Channel 3.[84]

188. Interconnection will be accomplished through a Secode terminal located at Tel-Car's Congress Building headquarters office. The terminal room is located adjacent to the control point and is secure. Computerized terminal equipment is powered by an Uninterruptible Power Source, thereby ensuring a uniform flow of electrical power and emergency power in case of an outage. (Tel-Car Ex. 3, pp. 3-4)

189. Tel-Car proposes a fully automated system. As was the case with Air-Beep, counsel for BPS argued that this constituted a variance from its application, citing the response to Item 50 of FCC Form 401, which represented that it would be a manual system. (TR 763-73) However, the Presiding Judge ruled that an amendment was not required and that proposing an automatic system did not constitute a variance. (TR 774) As noted, *supra,* the Presiding Judge noted that he would not entertain an argument that a preference should accrue because an automatic system was superior to a manual system. (TR 774-75)

190. If Tel-Car is authorized as the licensee of the 152.15 MHz channel, it estimates that it will be able to serve an additional 50 two-way units operating as an automatic system on Station KIB 527.[85] (TR 906)

191. Tel-Car, operating an automatic service, will employ an automatic disconnect device to impose circuit discipline upon mobiles using its trunked system. If all three or four channels are busy and a mobile call is attempted, the caller who has been on the air the longest will receive a warning tone and will be disconnected 15 seconds thereafter. (Tel-Car Ex. 3, pp. 11-12; TR 830)

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[83] One Biscayne Tower is located a few blocks to the east of the Congress Building. Its roof contains VHF remote receiving antennae for KIB 527 and like equipment associated with affiliates' stations. (Tel-Car Ex. 4, p. 1)

[84] Channel 3 is licensed to a commonly-owned affiliate, Tel-Car of Hollywood, Inc., at Hollywood, Florida. (Tel-Car Ex. 3, p. 14; TR 838)

[85] The capacity of Tel-Car's proposed trunked four-channel VHF system will be reduced because of the presence of paging units on two of the channels. (TR 848)

192. Tel-Car does not serve transient users on a billing basis. (TR 842) Rather, it allows transients five free calls during the course of a month and refuses to serve them thereafter unless they need to make an emergency call. (TR 842-43)

(e) *Maintenance*

193. Tel-Car's maintenance is performed by its own staff, consisting of three licensed technicians and eight or nine non-licensed technicians. Except for Station Engineer Richard Freihofer[86], whose office is in Hallendale, Florida, 20 miles north and 35 minutes driving time from Miami, Tel-Car's maintenance staff is located in the Congress Building, lll N.E. 2nd Avenue, Miami, a few blocks to the west of the proposed Number One Biscayne Tower base station. (Tel-Car Ex. 4, p. 2; TR 731, 742-44)

194. In addition to the proposed facility, Tel-Car's staff is responsible for the maintenance of the base stations and control points for Tel-Car's Stations KIB 527[87] and KRM 961[88], Radiopaging, Inc.'s Stations KSV 895[89] and KIE 367[90], Tel-Car of Hollywood, Inc.'s Stations KUS 267[91] and KUS 268[92], and Aerophone, Inc.'s Station KWT 946[93]. (TR 727-28, 732, 734, 735, 738) Altogether, this staff is responsible for the maintenance of at least eighteen base stations and seven control points in Miami and Hollywood, Florida. (Baker Rebuttal Ex. 7, pp. 4-5; TR 727-28) In addition, Tel-Car's staff is responsible for the maintenance of 15,000 paging units

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[86] Freihofer has since left Tel-Car's employ. He was replaced by Ed Lezcam (Tel-Car Statement, June 10, 1982). Lezcam did not testify and the record is silent as to his experience and qualifications.

[87] Station KIB 527 presently operates with two base stations, both of which are located at the Congress Building. Its control point is located at the Congress Building. (Baker Rebuttal Ex. 7, pp. 4-5)

[88] Station KRM 961 has separate base stations at five Miami locations: the Congress Building, 15780 W. Dixie Highway, 2333 Brickell Avenue, 9200 South Dadeland Boulevard and 12500 N.W. 92nd Avenue. Its control point is located at the Congress Building. (Baker Rebuttal Ex. 7, pp. 4-5)

[89] Station KSV 895 has four separate base stations, all of which, together with its control point, are located at the Congress Building. (Baker Rebuttal Ex. 7, pp. 4-5)

[90] Station KIE 367 has separate base stations at four Miami locations: the Congress Building, 15780 W. Dixie Highway, 9200 South Dadeland Boulevard and 12500 N.W. 92nd Avenue. Its control point is located at the Congress Building. (Baker Rebuttal Ex. 7, p. 5)

[91] Station KUS 267's base station is located at 3625 North Country Club Drive in Hollywood, Florida. Its control point is located at the Congress Building. (Baker Rebuttal Ex. 7, p. 5)

[92] Station KUS 268's base station is located at 3625 North Country Club Drive In Hollywood, Florida. Its control point is located at the Congress Building. (Baker Rebuttal Ex. 7, p. 5)

[93] Station KWT 946 is located in Miami. (Baker Rebuttal Ex. 7, p. 7)

and processes approximately 2,000 of these pagers through its repair facility every month. (TR 728, 730)

195. At the time of hearing, Freihofer had supervisory responsibilities with respect to five base stations authorized to Tel-Car affiliates in the Palm Beach, Florida area. (TR 735-37) It was proposed that Freihofer was to have supervisory maintenance responsibilities with respect to all stations which may eventually be authorized to Tel-Car and its affiliates in Florida and Georgia (TR 740), including proposed paging stations at Orlando (TR 738), Pensacola (TR 738), North Fort Myers (TR 738-39), Melbourne (TR 739), Daytona Beach (TR 739), Lakeland (TR 739), and Fort Pierce (TR 739), and proposed two-way stations at Melbourne (TR 739) and Fort Pierce (TR 739), Florida. If these facilities were authorized, Freihofer was to have initially spent much of his time getting them built and setting up maintenance procedures; thereafter he was to have had an oversight function, travelling to and from the various locations by car or plane, depending upon distance and upon the emergency of the situation. (TR 740-42)

196. Two of Tel-Car's three licensed technicians (including Freihofer at times) are assigned to "off duty call" between the hours of 5:00 p.m. and 7:00 a.m. on weekdays and during all hours on weekends. (Tel-Car Ex. 4, p. 4; TR 746-47) Freihofer did not, at the time, keep enough equipment at his Hallendale, Florida office to maintain a two-way base station. (TR 745)[94]

197. Tel-Car's maintenance staff does not work on any two-way mobile units, since it does not have the time, people or facilities to do that kind of maintenance. (Tel-Car Ex. 4, p. 4; TR 733-34) Tel-Car refers its customers to local maintenance shops which it believes are competent. (Tel-Car Ex. 4, p. 4; TR 733)

198. Tel-Car has a regular complaint procedure. Ms. Ann Meuse, radio room supervisor and an employee since 1973, handles service and billing complaints. She refers to the Technical Department (Freihofer) for action on those complaints concerning technical matters. (Tel-Car Ex. 3, p. 7; Tel-Car Ex. 4, p. 6)

(f) *Coverage*

199. Tel-Car's proposed 152.15 MHz facility proposes to serve an area of 847.2 square miles with a population of 1,430,205. (Tel-Car Ex. 1A, pp. 1-3; TR 1263)

(g) *Traffic and Need*

200. As noted, *supra,* if Tel-Car is the successful applicant in this proceeding, it proposes to trunk its proposed 152.15 MHz channel

[94] As noted, *supra,* Freihofer has been replaced by Ed Lezcam

operation with its existing Station KIB 527's 152.09 and 152.18 MHz channels and Tel-Car of Hollywood, Inc.'s (Station KUS 267) existing 152.06 MHz channel to form a four-channel VHF system. (TR 837-38, 840, 902) Tel-Car maintains that it needs the fourth channel to activate held orders and to relieve congestion on its existing facilities. (Tel-Car Ex. 3, p. 15)

201. In order to prove need for an additional channel for KIB 527, Tel-Car adduced evidence of the levels of utilization of that station and evidence of the nature and extent of alternative DPLMRS service provided over other frequencies licensed to Tel-Car and affiliates serving the same general geographic area. (Tel-Car Ex. 3, pp. 8-15)

202. Tel-Car conducted a traffic-load study on November 11, 12 and 13, 1980. (Tel-Car Ex. 3, p. 9 and Attachment 6) The results of this study of the then manual operation of the two KIB 527 channels are as follows (Tel-Car Ex. 3, Attachment C):[95]

KIB 527 Channel 5

	Tuesday 11/11/80	*Wednesday 11/12/80*	*Thursday 11/13/83*
Total Time in Use	474-1/4 min.	478-3/4 min.	468-1/4 min.
No. of Two-Way Calls [96]	72	72	85
No. of Paging Calls (Tone-Plus-Voice)	1453	1423	1389
Busiest Hour	4-5 p.m.	6-7 p.m.	3-4 p.m.
	53 1/4 min.	56 3/4 min.	55 3/4 min.
Least Busy Hour	7-8 a.m.	7-8 a.m.	7-8 a.m.
	9 3/4 min.	5 min.	5 3/4 min.
No. of Hours in Use Over 30 min.	9 of 12	10 of 12	10 of 12
Average Hourly Use (Rounded to nearest minute)	40	40	39

KIB 572 Channel 11

	Tuesday 11/11/80	*Wednesday 11/12/80*	*Thursday 11/13/80*
Total time in Use	297-3/4 min.	319-3/4 min.	331- 1/12 min.
No. of Two-Way Calls [97]	41	40	25
No. of Paging Calls	995	1035	1194
Busiest Hour	11 a.m. - Noon	3-4 p.m.	11 a.m. - Noon

[95] During the survey period, KIB 527 was operating in a manual mode prior to conversion to automatic service. In anticipation of the conversion to automatic units, manual units which went off service were not replaced with like units. (Tel-Car Ex. 3, p. 10)

KIB 572 Channel 11

	Tuesday 11/11/80	*Wednesday 11/12/80*	*Thursday 11/13/80*
Least Busy Hour	7-8 a.m.	7-8 a.m.	7-8 a.m.
	6-3/4 min.	1-1/12 min.	4 min.
No. of Hours in Use	4 of 12	4 of 12	7 of 12
Average Hourly Use (Rounded to nearest minute)	25	27	28

203. The results of the study of the then manual operation of Station KUS 267 are as follows (Tel-Car Ex. 3, Attachment G):

Station KUS 267-152.06 MHz

	Tuesday 11/11/80	*Wednesday 11/12/80*	*Thursday 11/13/80*
Total Time In Use:	144.00	188.00	161.00
Busiest Hour:	1-2 p.m.	4-5 p.m.	11-12 noon
	23.00	29.00	27.00
Least Busy Hour:	7-8 a.m.	7-8 a.m.	7-8 a.m.
	4.00	4.00	1.00
Hours Over 30 Minutes	0 of 12	0 of 12	0 of 12
Average Hourly Use	12.00	15.66	13.41

204. During the survey month, KIB 527 served 70 mobiles and 510 pagers. During the same period Tel-Car was holding orders for at least 79 additional mobiles ordered by persons representing 17 occupational groups. (Tel-Car Ex. 3, p. 9; Attachment B) During the period from December 1976 to November 1980 the number of mobiles served by KIB 527 declined from 106 to 70 while the number of pagers increased from 158 to 510. (BPS Rebuttal Ex. 7, pp. 5-6; Tel-Car Ex. 3, p. 9)

205. Tel-Car adopted the policy of "de-loading" pagers on KIB 527 in October 1980. This was done to prevent an overloading of KIB 527's two channels with pagers; 350 of the 510 units in service are units assigned to Category 1 personnel. (Tel-Car Ex. 3, pp. 10-11) Such personnel include physicians, hospital associates and public service employees. Paging messages for these Category 1 subscribers are generally more lengthy

[96] The survey covered twelve hours each day from 7 a.m. to 7 p.m. and provided information mandated by § 22.516 of the Rules and Regulations. Paging messages were assigned a uniform 15 seconds each for purposes of the study. On KIB 527, each voice page can consume up to 15.4 seconds of airtime. The 15-second estimate was based on Ms. Cockran's familiarity with calling patterns. If a given message consumes fewer than the 9.4 seconds maximum "window" allowed for the voice portion, the call is automatically terminated. (Stipulation No. 1)

[97] Tel-Car's traffic load "results" do not constitute the actual times of channel usage. Rather, all two-way calls were rounded out and recorded as lasting one, two, three or some other integral number of minutes. (Tel-Car Ex. 3, pp. 24-41, 81-89; TR 855-61)

than messages which are transmitted to subscribers in other user categories. (TR 879-880)[98]

206. Tel-Car has considered shifting paging subscribers to other mobile and paging frequencies as a method of reducing pager traffic on KIB 527 and to make room for additional mobile units. (Tel-Car Ex. 3, pp. 12-14)

207. It would appear to be possible for Tel-Car to increase the capacity of Station KIB 527 by reducing the length of each paging call. Tel-Car's Radiopaging, Inc. affiliate has reduced the length of the tone-plus-voice messages on its Station KIE 367 in Miami to 8 seconds, consisting of a 2-second tone alert and a maximum 6-second message. (Tel-Car Ex. 3, p. 12; TR 869-70) If Tel-Car employed the same maximum paging length on Station KIB 527, the channel usage during the "busiest hours" of its November, 1980 traffic load survey would have been reduced as follows:

Channel 5

11/11/80:	from 53.25 minutes to 32.60 minutes [99]
11/12/80:	from 56.75 minutes to 39.60 minutes
11/13/80:	from 55.75 minutes to 42.33 minutes

Channel 11

11/11/80:	from 35.75 minutes to 21.87 minutes
11/12/80:	from 43.00 minutes to 29.47 minutes
11/13/80:	from 39.75 minutes to 23.53 minutes

[98] Tel-Car made no attempt to time individual paging calls at any time during its traffic load study. (TR 862-63) Rather, it counted the number of paging calls and estimated that each page took exactly 15 seconds (Stipulation No. 1; Tel-Car Ex. 3, pp. 24, 27, 30, 33, 36, 39; TR 862-63) This 15-second estimate was only a fractional second less than the maximum 15.4 second tone-and-voice page, with its 6 second alerting tone and 9.4 second maximum message, for which Station KIB 527's paging terminal is programmed. (Stipulation No. 1) Since Station KIB 527's terminal automatically ends paging calls and moves on to other traffic when the message lasts less than the allotted 9.4 seconds maximum and since a typical message such as "Dr. Jones, call your office" takes only approximately six seconds to repeat twice in a slow and distinct manner, it appears that Tel-Car's 15-second estimate overestimated the time devoted to paging operations during the Station KIB 527 traffic load study.

[99] Between 4 p.m. and 5 p.m. on November 11, 1980, there were 177 pages on Channel 5. (Tel-Car Ex. 3, p. 24) Multiplying these 177 pages by 8 seconds and dividing by 60 seconds per minute, one obtains a figure of 23.60 minutes for paging time (as opposed to 44.25 minutes estimated under the 15 second per page standard). Adding 9 minutes for two-way use, the busy hour time with the more efficient 8-second page would have been 32.60 minutes. The same procedure was used for the other "busiest hours."

[100] Average hourly use (assuming an 8-second tone-plus-voice page) on November 11, 1980 (Tel-Car Ex. 8, p. 24) was computed as follows: Total paging time (1453 pages x 8 seconds) = 193.73 minutes) plus total two-way time (111 minutes), with the sum divided by 12 hours. The same procedure was used in calculating average hourly use.

208. Likewise, the average hourly usage of Station KIB 527's channels would be reduced if the maximum paging message length were reduced to 8 seconds. For example, during the November, 1980 traffic load study the following decreases in average hourly use could have been obtained:

Channel 5

11/11/80: from 39.52 minutes to 25.39 minutes
11/12/80: from 39.90 minutes to 26.06 minutes
11/13/80: from 39.02 minutes to 25.52 minutes

Channel 11

11/11/80: from 24.81 minutes to 15.14 minutes
11/12/80: from 26.75 minutes to 16.58 minutes
11/13/80: from 27.63 minutes to 16.57 minutes

208a. Tel-Car claims that it allows its Station KIB 527 paging subscribers a longer message (9.4 seconds) than Station KIB 367's subscribers (6 seconds) because it has a substantial number of Priority 1 paging subscribers on Station KIB 527.[101] (TR 879-80) However, it has never conducted any study to determine whether an 8-second page would be satisfactory to Station KIB 527's paging subscribers. (TR 880) If Tel-Car's Station KIB 527 retained the present 9.4 second message while reducing its six-second tone alert to the two-second beep provided by Station KIE 367, substantial additional capacity would be created. For example, if the tone segment of KIB 527's tone-and-voice paging calls was reduced from 6 to 2 seconds, the duration of the 1453 paging calls transmitted over Channel 5 on November 11, 1980 would have been almost 97 minutes less (1453 calls times 4 seconds = 5812 seconds = 96:52), that is almost the same amount of time devoted during that day to two-way calls (111 minutes). Tel-Car Ex. 3, p. 24)

209. Tel-Car explained that its 152.24 MHz Miami paging channel is dedicated to tone-only service and cannot feasibly be altered to handle the voice pagers served over KIB 527. Even if alterations were made, in order to accommodate 1000 voice pagers, Tel-Car would have to cease serving the 13,000 tone-only pagers, now signalled on 152.24 MHz. (Tel-Car Ex. 3, p.12)

210. Tel-Car maintains that its affiliate, Radiopaging, Inc., cannot accept KIB 527 voice paging units on its Miami UHF mobile station. All four two-way channels are dedicated to mobile radio service and handle in excess of 200 calls per day. (Baker Ex. 3, p. 13; Attachment F; Tel-Car Ex.

[101] Tel-Car did not explain why it placed large numbers of Priority 1 paging subscribers on Station KIB 527, where they are supposed to be served on a secondary basis only, rather than on Station KIE 367, which is a paging-only facility.

3-A) [102] Secondly, Radiopaging, Inc.'s waiting list is more than double Tel-Car's (164 units versus 79), and that affiliate serves 243 mobiles. (Tel-Car Ex. 3, p. 13)

211. Radiopaging's low-band paging channel does serve voice pagers. Tel-Car submits that that channel is overcrowded despite a strict 8-second time limit on messages. It serves 900 units, and Radiopaging, Inc. has ceased promoting one-way service. (Tel-Car Ex. 3, p. 12)

212. Another affiliate, Tel-Car of Hollywood, Inc., Hollywood, Florida, shares a VHF paging channel with two other RCCs. The Hollywood station's coverage contour is not co-extensive with KIB 527. This affiliate serves tone-only units and cannot add voice pagers because the sharing RCCs have loaded the channel with their own voice pagers. (Tel-Car Ex. 3, p. 14; Tel-Car Ex. 2, map #3)

213. Additionally, Tel-Car claims that use of Tel-Car of Hollywood, Inc.'s two-way (Channel 3) is not a feasible means of reducing pager utilization on KIB 527, since Channel 3 is a dedicated mobile channel. As noted, *supra*, Channel 3's coverage is not coterminous with the proposed service or the two KIB 527 service. Its coverage is principally over Broward County and does not reach some Dade County communities within the KIB 527 37 dBu. (Tel-Car Ex. 3, pp. 14-15; Tel-Car Ex. 1-A; Tel-Car Ex. 2; map #4)

214. Stated simply, Tel-Car's need claim is that:

> Congestion on KIB 527 exists and can only be alleviated through assignment of additional spectrum which would also allow for future growth on a trunked, automated station – with the new channel dedicated to mobile service – while at the same time satisfying held orders for 79 mobiles. (TR 847-848; Tel-Car Ex. 3, pp. 10, 15)

215. If Tel-Car were to become the licensee of the subject 152.15 MHz channel, it would give some degree of initial preference to BPS' existing manual two-way subscribers. (TR 906) That is, should their owners desire to invest in new automatic equipment, the 46 to 56 manual two-way units presently served by BPS (TR 318, 337) would be able to be among the possibly 50 additional units served by Tel-Car if it obtains the channel. (TR 906) Station KIA 956's existing tone-only customers could be accommodated on Tel-Car's low-band Station KRM 961, if necessary. (TR 885-86) However, the more than 600 tone-and-voice paging units presently served by BPS could not be accommodated on any of Tel-Car's facilities and, therefore, would be off service. (TR 886-87)

216. When Tel-Car automates its and Tel-Car of Hollywood, Inc.'s existing three channels, it will be able to accommodate 40 of the units on its waiting list on these channels. (Tel-Car Ex. 3, p. 10; TR 906) If it

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[102] On Thursday, December 4, 1980, one of three days of a Radiopaging, Inc. traffic load study on UHF, the call count was 288 on one of the channels. (Tel-Car Ex. 3-A, p. 3)

obtained this fourth VHF channel, it could add possibly 50 units. (TR 906). It is noted that even if it does not obtain the channel, Tel-Car will be able to accommodate up to 75 two-way units on the shared 12-channel system in the 470-512 MHz band for which it has been authorized in the Miami area. (TR 877-79)

Ultimate Findings and Conclusions

1. Baker Protective Services, Inc. (BPS) seeks renewal of the licenses for Station KIA 956 operating on frequency 152.15 MHz, Miami, Florida and Station KSD 312, operating on frequency 454.35 MHz, Chicago, Illinois. Air-Beep of Florida, Inc. (Air-Beep) and Tel-Car Corporation (Tel-Car) have filed applications to construct a new two-way station on frequency 152.15 MHz at Miami, Florida. As a result, the Air-Beep and Tel-Car permit applications for 152.15 MHz, Miami are mutually exclusive with BPS' renewal application for KIA 956. In addition to the comparative issue which has been specified relative to the choice to be made between the mutually exclusive proposals of BPS, Air-Beep and Tel-Car for operation on 152.15 MHz, Miami, Florida, there are a number of qualifying issues which have been designated against BPS.[103] The qualifying issues specified against BPS must be resolved in its favor before BPS is entitled to comparative consideration with the Air-Beep and Tel-Car proposals. The Commission has emphasized, and the Courts have affirmed, the principle that only basically qualified applicants are entitled to comparative evaluation. *Louis Adelman*, 28 FCC 432 (1960), affirmed *sub nom. Guinan Realty Company* v. *FCC*, 111 U.S. App., D.C. 371; 297 F. 2nd 782 (1961)

2. Wells Fargo Armored Service Corporation of Florida (Wells Fargo-Florida) was the licensee of Station KIA 956, Miami, from at least 1967 until April 1974 when the license was assigned to Baker Protective Services, Inc. (BPS), the present licensee. Wells Fargo-Florida during the period 1967-1974 was a wholly owned subsidiary of Wells Fargo Armored Service Corp. (Wells Fargo), a wholly owned subsidiary of Baker Industries, Incorporated (Baker Industries). As detailed in the findings, an indictment was returned June 1977 against Wells Fargo, Thomas W. Jones, James R. Leidgen and others charging them with violations of Section 1 of the Sherman Act during the period 1968 until August 1975 with respect to the providing of armored car and related services. Both Wells Fargo and Jones entered a plea of *nolo contendere*. Leidgen, who entered a plea of guilty, was president of Wells Fargo from 1967 until

[103] No mutually exclusive applications were filed against the renewal application of BPS for Station KSD 312 operating on frequency 454.35 MHz in Chicago, Illinois. Therefore, if BPS is found basically qualified to be a licensee, this renewal application is available for grant.

November 1974. Jones was executive vice president-operations of Wells Fargo from January to November 1974, at which time he succeeded Leidgen as president of Wells Fargo. Leidgen was also a vice president of Baker Industries from April 1968 to December 1969. Leidgen, however, had no duties or responsibility with respect to the operation of Baker Industries, and, was never on the board of directors of Baker Industries.

3. During the period prior to April 1974, Leidgen, as president of Wells Fargo, had general executive responsibility for the operation of Wells Fargo-Florida, then licensee of Station KIA 956. However, he did not exercise day-to-day supervision over this Miami station. Similarly, Jones, for the period January to April 1974, when he was executive vice president-operations of Wells Fargo, had general executive responsibility for the operation of Wells Fargo-Florida, including Station KIA 956. However, he was never involved in the day-to-day management of that station and first learned of its existence when the license was transfered from Wells Fargo to BPS in April 1974. Jones was never an officer or director of BPS or Baker Industries.

4. The antitrust misconduct related solely to the armored car service operated by Wells Fargo, a Baker Industries subsidiary, separate from BPS in terms of corporate structure, control and operations. The findings establish that those responsible for the day-to-day operation and control of Station KIA 956, Miami and Station KSD 312, Chicago, were not involved in the antitrust wrongdoing. With the exception of Leidgen, who was a Baker Industries' vice president for the period April 1968 to December 1969, no officer, director or employee of Baker Industries or BPS was involved in the antitrust wrongdoing. The findings establish that the antitrust wrongdoing did not involve the top management of Baker Industries or BPS. Nor does the record show, as claimed by Air-Beep, that the operations of Baker Industries, as parent, and its subsidiaries are so inter-related that corporate wrongdoing in one subsidiary, Wells Fargo, should be attributed to the other subsidiary (BPS) or to the parent. The contention that Malcolm Baker had any involvement in the anti-trust misconduct, or condoned the wrongdoing is not supported by this record and is rejected. BPS and Wells Fargo did not then and do not now share operating personnel. Since the antitrust misconduct was confined to Wells Fargo, a subsidiary of Baker Industries and, since neither BPS' or its parent, Baker Industries, had any involvement in the antitrust misconduct, it is concluded that the antitrust misconduct of Leidgen and Jones does not reflect on the basic qualifications of BPS to be a licensee.[104]

5. The Review Board has made clear that, in viewing past misconduct to the extent that "predictive judgment" can be made about future performance, the relevant considerations are the nature, frequency and

[104] *Westinghouse Broadcasting Co.*, 75 FCC 2d 736 (1980).

currency of the misconduct as well as the relationship of the wrongdoer to the applicant. The wrongdoing in question here occurred more than seven years ago, related solely to the armored car service operated by a separate subsidiary of the parent corporation and there is no indication that it has reoccurred. For these reasons, it is concluded that the wrongdoing has no predictive value whatsoever on prospective compliance with Commission Rules and policies. For this reason no comparative demerit will be assessed relative to this matter. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 592-593 (Rev. Bd. 1982)

6. Section 1.65 of the Commission's Rules, 47 CFR 1.65, requires, *inter alia*, that an applicant report to the Commission "as promptly as possible" and in any event within 30 days any "matter which may be of decisional significance in a Commission proceeding involving the pending application. . . ."[105] For the reasons set forth, *infra*, it is concluded that the failure of BPS to report the antitrust proceedings against Wells Fargo resulted from inadvertence and not because of any intent to conceal this fact from the Commission.

7. Dennis Stern, the vice president and general counsel of the BPS Division which operated Station KIA 956, had responsibility for FCC compliance with respect to the renewal applications. While he was aware of the antitrust proceeding, he did not know that Wells Fargo-Florida, the former licensee of Station KIA 956, was at one time a wholly owned subsidiary of Wells Fargo. He did not realize that the antitrust proceedings should have been reported to the Commission. When communications counsel learned of the antitrust proceeding from Stern or another house counsel, they reported it to the Commission by letter dated September 26, 1980. It is ruled that the licensee had no improper motive in its failure to have reported the antitrust matters prior to filing the September 26, 1980 letter with the Commission.

8. In enlarging the issues to include a 47 CFR 1.65 issue, the Presiding Judge noted the fact that the September 26, 1980 letter reporting the antitrust misconduct failed to report the conviction of James R. Leidgen; its emphasis that Jones was the only indicted Wells Fargo official, and that Jones joined the company after Wells Fargo had relinquished control of Station KIA 956. The Presiding Judge also expressed concern that the September 26, 1980 letter of counsel represented that no official or

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[105] The Presiding Judge ruled that the BPS renewal application did not call for the reporting of the antitrust violations. *Memorandum Opinion and Order* (FCC 81M-3067), released September 25, 1981. However, since the antitrust misconduct encompassed the time period 1968 through August 1975, and since Wells Fargo-Florida, a subsidiary of Wells Fargo, was licensee of Station KIA 956 until April 1974, it is ruled that the filing of the indictments and the subsequent convictions were matters of "decisional significance" which should have been reported to the Commission in a timely manner.

employee of Baker Industries was connected in any way with the antitrust misconduct when, as detailed in the findings, Leidgen was vice president of Baker Industries from April 1968 to December 1969. It is not disputed that the September 26, 1980 letter of counsel was not complete and accurate in that it omitted reference to the participation of Leidgen in the antitrust misconduct and inaccurately reported that Wells Fargo-Florida and Wells Fargo were separate wholly owned subsidiaries of Baker Industries.

9. The findings detail the circumstances surrounding the preparation of the September 26, 1980 letter, and, more particularly, the fact that David Wells, vice president and general counsel of Wells Fargo, who played a part in the preparation of the letter, did not advise Stern or BPS' communications counsel of Leidgen's involvement in the antitrust misconduct. Wells' explanation is that he mistakenly focused on Leidgen as president of Brinks, Inc. (Brinks) rather than as former president of Wells Fargo.[106] Wells further explained that he focused solely on Wells Fargo employees at the time of the indictment. This caused him to omit Leidgen's name on the information he provided to Stern and BPS' communications counsel.

10. It is also not disputed that the September 26, 1980 letter was incorrect in representing that in 1967 the Commission had granted a transfer of control of Wells Fargo-Florida from Wells Fargo to Wells Fargo Armored Transport Corporation, "a separate and wholly owned subsidiary of Baker Industries, Inc." This error, made by one of BPS's communications counsel, caused BPS to misstate, unintentionally, that Wells Fargo-Florida was not, since October 1967, a subsidiary of Wells Fargo. This misstatement was inadvertent, resulting from confusion as to the corporate structure and name changes.

11. Air-Beep urges that this failure by Wells, an experienced attorney who was aware that he was supplying information to the FCC and that it would be relied upon by the agency, calls for the disqualification of BPS. However, in support of such a conclusion, it relies on numerous inferences and innuendos. These are no substitute for evidence. The record does not support a conclusion that Wells or any one else connected with BPS intentionally sought to conceal facts from or mislead this Commission. Wells must be found wanting in that he was negligent and careless. The others in the Baker Industries organization relied upon Wells to provide them with accurate information and there is no record evidence suggesting that they purposefully attempted to conceal facts from the Commission. Unquestionably, the September 26, 1980 letter contained errors; however, it is ruled that they were inadvertent, not the product of fraud

[106] As noted, *supra*, Leidgen left Wells Fargo in November 1974 to become president of Brinks.

or deceit but rather resulted from inadvertencies by Wells. It is concluded that neither disqualification or comparative demerit should be assessed against BPS since there was no intention to conceal, deceive or mislead this Commission. The failure to report the antitrust proceeding was an error in judgment and not the result of bad faith or deliberate deception. The errors in the September 26, 1980 letter were the product of unintentional error. Under these circumstances, disqualification or the assessment of a comparative demerit is not warranted. *Webster-Baker Broadcasting Co.*, 88 FCC 2d 945; 50 RR 2d 1142, 1145-46 (Rev. Bd. 1981)

12. Issue (a), designated by the Commission, seeks to determine whether top management of Borg-Warner Corp. (Borg-Warner)[107], was involved in the conduct that lead to the antitrust conviction and the *nolo contendere* plea concerning violation of the Sherman Antitrust Act. This issue also seeks to determine whether any individuals involved in that misconduct are involved in the operation of Stations KIA 956, Miami, Florida and KSD 312, Chicago, Illinois. As detailed in the findings, the *American Standard* and/or *R. & G. Sloane* cases involved the manufacture and sale of plumbing fixtures and plastic pipe fittings, respectively, by Borg-Warner. The conduct in question occurred during the period 1962-1966 with respect to the *American Standard* case and from 1966 to 1971 with respect to the *R. & G. Sloane* case. It is ruled that BPS has met its burden of proceeding with the introduction of evidence and its burden of proof in establishing that no one involved in the top management of Borg-Warner, either as a general corporate officer, a director, or an employee with corporate-wide responsibility, was involved in the antitrust misconduct which lead to the conviction in the *American Standard* case and the *nolo contendere* plea in the *R. & G. Sloane* case. Additionally, the evidence establishes that no one involved in the antitrust misconduct was, or is, involved in the management of Baker or BPS, or in the operation of the Miami or Chicago mobile radio stations.

13. Pursuant to issue (b), the effect of the conviction and the *nolo contendere* plea in the *American Standard* and *R. & G. Sloane* cases on Borg-Warner and BWA Corporations' qualifications to control a licensee, and on BPS's basic and comparative qualifications to be a licensee, was required to be considered only if it had been determined under issue (a) that individuals involved in such antitrust misconduct are part of the Borg-Warner top management or will be involved in the operation of the licensed facilities at Miami and/or Chicago. Since issue (a) has been answered in the negative, it is ruled that the antitrust conviction and *nolo contendere* plea have no effect on Borg-Warner's or BWA Corporation's

[107] BWA Corporation, a wholly owned subsidiary of Borg-Warner, acquired control of Baker Industries, the parent of BPS, licensee of Stations KIA 956 and KSD 312, in January 1978.

qualifications to control the Commission's licensee or on BPS's basic and comparative qualifications. As a result of this ruling, this antitrust misconduct which occurred many years ago will not be given any consideration in the overall comparative evaluation, discussed, *infra.*

14. Issues (c) and (d) seek to determine the facts and circumstances surrounding the unauthorized transfer of control of Stations KIA 956 and KSD 312 and the effect on BWA Corporation's and/or its parent Borg-Warner's qualifications to control a Commission licensee and on BPS's basic and comparative qualifications. The facts relative to this matter are fully set forth in the findings and will not be repeated here. They establish that there was an unauthorized transfer of control of BPS from Baker Industries to Borg-Warner but that it was inadvertent and that it occurred notwithstanding the efforts of Borg-Warner to avoid such an incident. The contention of Air-Beep that a motive existed for Malcolm and Solomon Baker not to have sought prior Commission consent to the transfer is not persuasive. Air-Beep's claim that the Bakers intentionally ignored the prohibition against transfers of control of corporate licensees without prior Commission consent because of their desire to sell shares in Baker Industries at a substantial profit is not supported by the record evidence. The findings establish that Solomon and Malcolm Baker made no representations to Borg-Warner in connection with the sale of their stock and, additionally, that the sale of the Baker family stock was not conditioned in any way on the successful completion of the Borg-Warner tender offer for the remaining Baker Industries stock.

15. It is concluded, on the entirety of the record, that this unauthorized transfer of control was unintentional and occurred despite the adoption of procedures designed to ensure that the acquisition of this publicly held corporation would be accomplished in a legal manner. The then General Counsel of Baker Industries must be faulted for not having realized the need to seek prior Commission consent for the transfer of control.[108] However, this failure was inadvertent and attributable to the fact that the Miami and Chicago mobile facilities accounted for a relatively small fraction of Baker Industries' business. When it became known that prior Commission consent was required, the matter of the unauthorized transfer of control was voluntarily reported to the Commission. The facts do not reflect upon the qualifications of BWA, Borg-Warner, Baker Industries or BPS to be a Commission licensee. Where the violation was inadvertent, there was no intent to ignore Commission requirements and the matter was voluntarily reported to the Commission in a reasonably timely manner, the assessment of a comparative demerit

[108] The individuals in the Baker organization most familiar with the Commission's requirements were not involved in the negotiations or tender offer.

is not warranted. *Merrimack Valley Broadcasting, Inc., 92* FCC 2d *506*; 52 RR 2d 1210, at 1219-1220 (Rev. Bd 1982)

16. As noted, *supra*, no mutually exclusive applications were filed against the renewal application of BPS for Station KSD 312 operating on frequency 454.35 MHz in Chicago, Illinois. Since the qualifying issues designated against BPS have been resolved in its favor, the Station KSD renewal application is ripe for grant.

17. In view of the favorable resolution of the BPS qualifying issues, it is now appropriate to address the comparative choice to be made among the three mutually exclusive proposals; namely the renewal application of BPS for Station KIA 956 to continue operation on frequency 152.15 MHz, Miami, Florida and the construction permit applications of Air Beep and Tel-Car to construct two-way facilities on this frequency in Miami. The comparison to be made is of a dual nature (issues (e) and (f)), namely, the comparative "need" for the proposed facilities and the "service" which would be rendered by the applicants.

18. This is the first comparative renewal proceeding in the DPLMRS service. To date the Commission has not considered the question posed by the possible withdrawal or disruption of service to existing DPLMRS subscribers. It is within this context that the service and need comparative factors must be considered.[109]

19. Both BPS and Tel-Car have urged that the "critical and decisive" comparative factor in this case is the comparative need for the proposed service.[110] Since this contention has merit, it is appropriate to first address the need showing of the applicants.

20. The findings establish that the Air Beep proposal will encompass the largest area and population within its proposed 37 dBu contour. However, the Commission has emphasized that in evaluating the need for two-way mobile service, it must be recognized that this service, unlike the broadcast service, does not serve the general public. On the contrary, it provides a specialized service to a limited number of private users who must pay a fee for such service. The Commission has stressed that, because of the unique nature of this service and its customers, need for it may not be presumed, but must be established by the applicant by the adduction of basic facts and not by insinuation or inference.[111] The nature of DPLMRS service renders population statistics meaningless as an

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[109] The Presiding Judge does not adopt the argument that BPS is entitled to a renewal expectancy. Neither the courts or the Commission has indicated that such an expectancy is applicable to the DPLMRS service. Additionally, BW assumed control of the licensee subsequent to the time that these applications were mutually exclusive. Under these circumstances, BW cannot be heard to claim that it is entitled to a renewal expectancy.

[110] BPS's Findings, p. 163; Tel-Car Reply, p. 15.

[111] *Long Island Paging*, 30 FCC 2d 405 (Rev. Bd. 1971), *review denied*, 32 FCC 2d 235 (1971), *reconsideration denied*, 34 FCC 2d 216 (1972).

indication of a particular need for the specialized service.[112] The Commission has continually expressed the need for efficient allocation of these frequencies to relieve existing congestion and has emphasized the requirement that an existing carrier must persuasively show a need for additional facilities.[113]

21. BPS, Tel-Car and Bureau, note that Air-Beep elected not to adduce evidence of the need for the proposed service within its 37 dBu contour. The Presiding Judge agrees that Air-Beep's failure to conduct a survey of Miami DPLMRS needs or to make an attempt to comply with the showings required by *Long Island Paging, supra*, constitutes a failure to proof under the comparative need aspect of issue (f).[114] The Presiding Judge rejects Air-Beep's contention that, since BPS is an existing carrier and the record contains "other evidence" of need for "generally the same service" as Air-Beep will offer, it was not required to submit a need showing. There can be no comparison relative to need if the applicants are unable or unwilling to make the showing. Air-Beep's further contention that the parties have confused the "capacity question" with the need question is not persuasive, particularly in view of the fact that Air-Beep did not address the question whether its purported need for the service is greater than Air-Beep's present capacity to meet such need through its operation of Station KKB 693 on Channel 34.[115] For this reason, Air-Beep is assessed a substantial comparative demerit.

22. Tel-Car, in its Reply Findings, acknowledges that it bore the burden under issue (f) of demonstrating need for additional spectrum to accommodate present and anticipated demand for mobile radio. In considering Tel-Car's need showing, it must be noted that Tel-Car proposes, in the event it is the successful applicant in this proceeding, to trunk its proposed 152.15 MHz channel operation with Station KIB 527's existing operation on channels 152.09 and 152.18 MHz and Station KUS 267's existing operation[116] on 152.06 MHz. At the time of hearing Tel-Car was converting its existing three channel trunked operation from a manual to an automatic system. As noted, *supra*, if Tel-Car is successful, the 152.15 channel will be trunked with these channels to form a four

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[112] *Empire Communications, Inc.*, 47 FCC 2d 329.

[113] *Mobile Phone of Texas, Inc.*, 75 FCC 2d 249, at 252 (Rev. Bd. 1979)

[114] Air-Beep introduced no traffic load study, no survey of the local public and no other evidence relating to the question of need for its proposed service.

[115] Air-Beep introduced no evidence indicating how its Channel 34 operation or its shared use of a 12-channel two-way mobile operation in the band 470-512 MHz in Miami would impact its purported need for the proposed facility.

[116] KUS 267, licensed in Hollywood, Florida, is licensed to Tel-Car of Hollywood, Inc., a commonly owned corporate affiliate, which also operates Station KUS 268, which offers a paging service on 158.70 MHz.

channel VHF automatic system.[117] Tel-Car claims that it needs the fourth channel to activate held orders and to relieve congestion on its existing three channel system.[118] If Tel-Car is successful and is authorized to operate on 152.15 MHz, it estimates that it will be able to serve an additional 50 two-way units.

23. In support of its claim of need for an additional channel, Tel-Car adduced evidence of the levels of utilization of Stations KIB 527 and KUS 267 and evidence of the nature and extent of alternative DPLMRS service provided over other frequencies licensed to Tel-Car and affiliates serving the same general geographic area.

24. Tel-Car conducted traffic-load studies of the operations of Stations KIB 527 and KUS 267 on November 11, 12 and 13, 1980.[119] However, there are certain deficiencies in Tel-Car's need showing which render suspect its claim of need for an additional two-way VHF channel in Miami.

25. As noted, *supra*, Tel-Car's traffic load studies for Stations KIB 527 and KUS 267 were conducted at a time when the stations were offering manual mode service. Were Tel-Car then operating in the automated mode, it appears reasonable to conclude that, because of the increased speed of access, Tel-Car would have been capable of accommodating most of those on its held order list on its three trunked VHF channels.[120]

26. Section 22.516(b) of the Rules, 47 CFR 22.516(b), requires the submission of data "showing the actual traffic loading on each channel assignment of the present radio systems." However, Tel-Car's traffic load

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[117] Tel-Car is also licensee of Miami Station KRM 961, which operates on one-way frequency 152.25 MHz. Radiopaging, Inc., a commonly owned corporate affiliate, operates two Miami facilities, namely, Station KSV 895, which provides an automated VHF two-way mobile telephone service on 454.025 MHz, 454.075 MHz, 454.125 MHz and 454.225 MHz and Station KIE 367, which provides paging service on 43.58 MHz. Another affiliate, Aerophone, Inc., is the licensee of an air-ground DPLMRS facility in Miami.

[118] As detailed in the findings, the system proposed would not fully utilize the efficiencies of trunking for a number of reasons. First, not all customers would be required to utilize units capable of operating on all four frequencies. Second, although the three KIB 527 frequencies, as proposed, would be coterminous with each other, they would not be coterminous with the Tel-Car of Hollywood frequency. Finally, the frequency proposed in the present application would be limited to two-way use while the other frequencies would also be used to provide paging service, which might further reduce the benefits of trunking.

[119] During the survey period, these stations were operating in a manual mode prior to conversion to automatic service. In anticipation of the conversion to automatic units, manual units which went off service were not replaced with like units.

[120] The Presiding Judge is not convinced by BPS's argument that Tel-Car's traffic load studies of its manual system are not germane to the question of need for its proposed automatic service. These modes of service are not so dissimilar as to warrant discarding these studies.

"results" do not constitute the actual times of channel usage. Rather, all two-way calls were rounded out and recorded as lasting one, two, three or some other integral number of minutes. This erodes the reliance to be placed on this study.

27. Additionally, Tel-Car made no attempt to time individual paging calls at any time during its traffic load study. Rather, it counted the number of paging calls and estimated that each page took exactly 15 seconds. This 15-second estimate was only a fractional second less than the maximum 15.4 second tone-and-voice page, with its 6 second alerting tone and 9.4 second maximum message, for which Station KIB 527's paging terminal is programmed. Since Station KIB 527's terminal automatically ends paging calls and moves on to other traffic when the message lasts less than the allotted 9.4 seconds maximum and since a typical message such as "Dr. Jones, call your office" takes only approximately six seconds to repeat twice in a slow and distinct manner, it is ruled that Tel-Car overestimated the time devoted to paging operations during the Station KIB 527 traffic load study.

28. The findings establish that Station KIB 527's two channels are extensively used by tone-plus-voice paging. The findings further establish that it would be feasible for Tel-Car to increase the capacity of Station KIB 527 by reducing the length of each paging call. Tel-Car's Radiopaging, Inc. affiliate has reduced the length of the tone-plus-voice messages on its Station KIE 367 in Miami to 8 seconds, consisting of a 2-second tone alert and a maximum 6-second message. If Tel-Car reduced the maximum length from 15.4 seconds and employed the 8 second maximum paging length on Station KIB 527, the channel usage during the "busiest hours" of its November, 1980 traffic load survey would have been materially reduced.

29. The traffic studies do not support Tel-Car's claimed need for an additional channel. Station KIB 527's 152.18 MHz channel has an average hourly use of less than 30 minutes and Station KUS 267's 152.03 MHz channel has an average hourly use of less than 15 minutes per hour.[121] Tel-Car has not satisfactorily explained why it could not shift paging subscribers on Stations KIB 527 and KUS 267 to other mobile and paging frequencies, held by itself or its affiliates, as a method of reducing pager traffic on these stations; thus, making room for additional mobile units. Given the room presently available for expansion of mobile service on its facilities, it is ruled that Tel-Car's need showing results in a comparative demerit.

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[121] One of the three days averaged 15.66 minutes.

30. The Presiding Judge agrees with the Bureau that BPS, in its operation of Station KIA 956, with 46 two-way mobile units[122], 640 tone and voice pagers and 59 tone only pagers and 3 message relay units, is currently making a satisfactory utilization of the 152.15 frequency. BPS, in support of its need showing, submitted a traffic load study which showed the station in use for more than 40 minutes during the busiest hours and on, an average, for approximately 30 minutes per hour. Additionally, BPS established need for service within the increased area to be served in the event of a grant of its pending license modification application (File No. 20355-CD-P-77). A significant number of Station KIA 956's present subscribers regularly travel within the proposed gain area and some of these would request additional mobile units if its application is granted. It is ruled that BPS is entitled to a substantial comparative preference relative to the need showing of the applicants.[123]

31. Turning to the second aspect of the comparative evaluation, namely, the nature and extent of the service proposed by the applicants, it is appropriate to note that each of the applicants proposes different charges for its service. More importantly, each applicant proposes a significantly different type of service. In view of these disparities, it is ruled that the proposed rates to be charged is not an area for comparative merit or demerit for any of the applicants.[124] As stated by the Bureau, decisionally significant differences do not exist relative to this comparative factor.

32. All of the applicants have shown that they have a program of equipment maintenance and qualified personnel for both operation and maintenance of such equipment. Each of the applicants relies on outside contractors to supplement its in-house capability. No area of decisional comparative evaluation was developed and it is concluded that no comparative preference is to be awarded.

33. Both BPS and Tel-Car's radio common carrier businesses are adequately staffed and managed and neither merits a preference in this regard. Air-Beep proposes active participation by its principals and is entitled to a slight preference for such integration of ownership with management. *Houston Mobilfone, Inc.*, 65 FCC 2d at 856 (Rev. Bd. 1977)

34. It is found that all three applicants propose adequate facilities to effectuate their proposals. BPS claims that its proposal to provide a "hot

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[122] At the time of hearing, it was reported that the number was soon to be increased to 56 units.

[123] In view of this ruling, it is not necessary to consider BPS's argument that a choice of one of the other applicants would result in "serious potential disruption of service" to BPS's subscribers.

[124] A preference with respect to the rates to be charged is not warranted where, as here, the applicants had not adduced evidence establishing the methodology used in formulating their proposed charges. *Houston Mobilfone, Inc.*, 65 FCC 2d at 859 (1977)

standby" transmitter entitles it to a comparative preference. While it is recognized that preferences were given for proposing such transmitters in the past, the Presiding Judge agrees with the Bureau that the holding in *Frank K. Spain*, 77 FCC 2d 20, 25 (1980), mandates that such a preference not be awarded in this case in view of the failure of BPS to establish the additional cost and whether such cost is offset by the benefits derived. It is concluded that no preference is to awarded to any of the applicants in this area of comparative evaluation.

35. BPS is entitled to a slight comparative preference over the other two applicants for developing a set of written regulations governing its relationships with its subscribers.

36. The Presiding Judge is not persuaded that BPS warrants a comparative preference over Tel-Car and Air-Beep for offering the public a greater choice of service on the 152.15 MHz frequency. As detailed in the findings, Tel-Car will provide only two-way service on the channel and Air-Beep will provide tone-plus-voice paging and mobile service. BPS offers its subscribers a choice of manual two-way service, automatic tone-plus-voice paging, automatic tone-only paging service and manual message relay service. Section 21.501(c) of the Rules, 47 CFR 21.501(c), reserves the subject channel for two-way communications with a permissible one-way usage, solely on a secondary basis. In light of this, the claimed preference by BPS has no merit.

37. Neither Tel-Car or Air-Beep had demonstrated that its proposed automatic system affords any countervailing advantages over BPS's manual system warranting a preference. The Bureau correctly noted that manual and automatic services are different functionally and that BPS offers the public in Miami a choice between the two types of delivery systems. While it might be argued that the automatic system is more efficient and, as a general rule, accommodates more subscribers, under the circumstances here where denial of BPS's renewal would result in a withdrawal of manual service, it is ruled that this aspect of comparative consideration does not result in any merit or demerit being assessed.[125] However, it is ruled that BPS's policy of providing unlimited service, at a charge, to transient subscribers while they are travelling in the Miami area warrants a slight preference.

38. The findings establish that both Tel-Car and Air-Beep are licensees of two-way and paging facilities in the Miami market. A choice of either of these two applicants would reduce the number of sources from which Miami residents can obtain two-way service. Grant of the BPS renewal

[125] The Presiding Judge ruled that automatic two-way service proposals advanced by both Tel-Car and Air-Beep at the hearing constituted a variance from their applications. As a result, these applicants cannot claim a comparative advantage in this area of comparison.

proposal would result in the preservation of the existing level of Miami two-way competition. It is concluded that BPS is accorded a moderate preference.

39. In summary, it is concluded that BPS is qualified to be a licensee of the Commission and that its application for renewal of its Chicago DPLMRS Station KSD 312, which stands alone, can be granted. It is further concluded that the comparative evaluation of BPS's renewal application for Station KIA 956, Miami and the Tel-Car and Air-Beep permit applications results in the choice of BPS. As detailed, *supra*, BPS is entitled to a substantial preference as to "need", a moderate preference relative to preservation of competition and slight preferences with respect to establishing regulations and the provision of transient service. These preferences clearly outweigh the slight preference awarded Air-Beep because of its integration of ownership and management. Additionally, BPS has established that grant of its application for improvement of Station KIA 956's facilities would serve the public interest.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with Section 1.276 of the Rules, 47 CFR 1.276, the applications of Baker Protective Services, Inc. for renewal of the license (File No. 25288-C2-R-74) for consent to transfer of control (File No. 20894-CD-TC-(2)-78) and for modification of the facilities of Station KIA 956, Miami, Florida, ARE GRANTED and the applications of Air-Beep of Florida, Inc. and Tel-Car Corporation ARE DENIED.[126]

FEDERAL COMMUNICATIONS COMMISSION

THOMAS B. FITZPATRICK, *Assistant Chief Administrative Law Judge*

[126] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 CFR 1.276(d).

Appeal, From Initial Decision, Denied
Application, Amendment of, After Designation
Dismissal
Failure to Prosecute
Multipoint Distribution Service (MDS)

Review Board denied appeal from ALJ's dismissal of MDS application for failure to prosecute and grant of competing application. Applicant's unexplained announcement on exhibit exchange that it did not intend to submit a comparative case amounted to intentional default. Good cause existed for accepting competitor's transmitter site amendment.

—*Broadcast Data Corp.*
CC Docket No. 83-866

FCC 84R-37

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BROADCAST DATA CORP.	CC Docket No. 83-866 File No. 10301-CM-P-80
and	
KRAVETZ MEDIA CORPORATION	CC Docket No. 83-867 File No. 11610-CM-P-80
and	
TELECOMMUNICATIONS SYSTEMS, INC.	CC Docket No. 83-868 File No. 50018-CM-P-81
For Construction Permits in the Multipoint Distribution Service for a New Station at Farmington, New Mexico	

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 1984; Released: May 22, 1984.

BY THE REVIEW BOARD:

1. By *Memorandum Opinion and Order*, 48 Fed. Reg. 40955, published September 12, 1983, the mutually exclusive applications of Broadcast Data Corp. (BDC), Kravetz Media Corporation (Kravetz), and Telecommunications Systems, Inc. (TSI) for authority to construct a new station in the Multipoint Distribution Service (MDS) at Farmington, New Mexico were designated for hearing on an issue to determine, on a comparative basis, which applicant would best serve the public interest, convenience and necessity. By *Order*, FCC 84M-717, released February 10, 1984, presiding Acting Chief Administrative Law Judge Thomas R. Fitzpatrick (ALJ) confirmed his oral ruling made at the February 8, 1984 hearing (Tr. 17-35) that the applications of TSI and Kravetz, which chose not to submit written direct comparative cases, would be dismissed with prejudice for failure to prosecute; he also granted the BDC application and terminated the proceeding. Now before the Board is Kravetz's appeal, filed March 12, 1984.[1] We deny the appeal and affirm the ALJ's dismissal of the Kravetz application and grant of the BDC application.

2. *Background.* At a November 7, 1983 prehearing conference, the ALJ requested that all of the direct comparative evidence in this proceeding should be submitted in writing.[2] The parties present at the conference (BDC and the Common Carrier Bureau) agreed to this procedure, and the ALJ ruled that the absent parties, Kravetz and TSI, would be bound. Tr. 9. Two days later, the ALJ confirmed this arrangement, ordering that "The applicants *are to exchange* their direct written cases . . ." (emphasis added) on January 6, 1984. *Order*, FCC 83M-4102, released November 9, 1983. On January 6, Kravetz filed a letter with the ALJ stating that it was not going to submit any hearing exhibits, but instead would request at hearing that "official notice [be taken] of its basically qualified application," and that it intended to "continue to prosecute its application on a non-comparative basis, as will be explained more fully at the hearing session . . . ." In its January 6 direct case submission, BDC stated that it had secured a new antenna site because of loss of availability of its original site, and that it was preparing appropriate engineering amendments. These amendments were filed on January 25 and 31, 1984.

3. At the February 8 hearing, Kravetz argued that both TSI and BDC were no longer basically qualified applicants – TSI because it had not

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[1] TSI has not filed an appeal. Accordingly, its dismissal is final. *See* Section 1.302 of the Rules, 47 CFR § 1.302.

[2] The ALJ presaged this discussion in an *Order Prior to Prehearing Conference*, FCC 83M-3034, released September 6, 1983, which provided, at para. f(2): "The Presiding Judge intends to request the parties to submit their direct case in writing."

appeared for hearing and BDC because it had lost its original transmitter site. Although he agreed with Kravetz that the TSI application should be dismissed, the ALJ ruled that Kravetz had been "in default" since January 6, 1984, when Kravetz declared it would not prosecute its application on a comparative basis and declined to exchange its written direct case, and that its application would therefore be dismissed, too. He then ruled that since BDC's transmitter site amendment was minor, its petitions for leave to amend would be granted, and that BDC, as the only remaining basically qualified applicant in the proceeding, would be awarded the construction permit. The ALJ's confirmatory *Order*, FCC 84M-717, *supra*, followed.

4. In its appeal, Kravetz argues that it did not fail to prosecute by not exchanging its direct case because the ALJ's order was "*permissive* rather than *directive*"; that, at most, it was guilty of a failure of proof; that it was justified in not exchanging its direct case because it regarded the other applicants as unqualified; and that the ALJ should have rejected BDC's engineering amendments. We disagree.

5. *Discussion.* It is well-established that the ALJ has broad power to regulate the course of a hearing, *see* Section 1.243(f) of the Rules, 47 CFR § 1.243(f), which power is " 'plenary' and 'invests [him] with great latitude.' " *RKO General, Inc.*, 48 FCC 2d 826, 827, 31 RR 2d 303, 304 (Rev. Bd. 1974). See also *Pan American Broadcasting Co.*, 89 FCC 2d 167, 170-71, 50 RR 2d 1546, 1548-49 (Rev. Bd. 1982), regarding the importance of an ALJ's prehearing requirements. Although an ALJ may direct the filing of written affirmative cases *without the parties' consent* only in certain specified broadcast proceedings, *see* Section 1.248(d) of the Rules, 47 CFR § 1.248(d), in the case at bar, all parties present at the November 7, 1983 prehearing conference agreed to using written direct cases and Kravetz neither explained its absence from the conference nor filed any objection to the procedure agreed to at the conference and confirmed in the ALJ's November 9, 1983 Order, *supra*. Consequently, Kravetz waived any right it may have had to oppose that procedure which, in the circumstances, was fully consistent with the ALJ's plenary authority.

6. In our view Kravetz's unexplained announcement on the January 6 exchange date that it did not intend to submit a comparative case – and the comparative issue was the only one designated – was a blatant and unjustified violation of the ALJ's directive that amounted to an intentional default or decision not to prosecute its application in a serious fashion. *Cf. Progress Broadcasting Corp.*, 3 RR 2d 542, 544 (Rev. Bd. 1964) (applicant may be held to have failed to prosecute for failure to take required action). The proper sanction for such a disruptive course of conduct, which unilaterally sought to undermine the Commission's determination to

conduct a comparative hearing here, is dismissal of Kravetz's application with prejudice. *See Mad River Broadcasting Co., Inc.*, FCC 84R-36, released May 18, 1984 (Rev. Bd.); *Lebanon Valley Radio*, 11 FCC 2d 31, 11 RR 2d 998 (Rev. Bd. 1967); *Reliable Broadcasting Co.*, 25 RR 93 (Rev. Bd. 1963). This conclusion is not diminished by Kravetz's contention now that it "intended" to continue prosecuting its application and was only ignoring the ALJ's directive "for strategic reasons." It proceeded at its peril in not articulating and supporting its unauthorized strategy – see paragraph 2, *supra* – and has lost. *See Colorado Radio Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941). Kravetz's claim that it only engaged in a failure of proof and should not have been dismissed for failure to prosecute is contradicted by the *Mad River* , *Lebanon*, and *Reliable* cases, *supra*, where applicants were in fact dismissed because, like Kravetz, they declined to exchange hearing exhibits on the date specified. *See also A.C. Elliott, Jr.*, 56 FCC 2d 351, 35 RR 2d 467 (Rev. Bd. 1975). And even if Kravetz were procedurally correct, its refusal to adduce comparative evidence here would result, in any case, in a dispositive comparative preference – and a grant – to BDC. *See George E. Cameron, Jr. Communications*, 91 FCC 2d 870, 896-97, 52 RR 2d 455, 475-76 (Rev. Bd. 1982).

7. Finally, Kravetz's contention that BDC should have been disqualified by the ALJ is wholly without merit. We agree with the ALJ and the Bureau that good cause existed for acceptance of BDC's transmitter site amendment, which timely cured a disqualifying defect. *See* Section 21.23(b) of the Rules, 47 CFR § 21.23(b); *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970); *compare Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983) (transmitter site amendment lacked good cause) *with Old Time Religion Hour, Inc.*, *95* FCC 2d *713*, 54 RR 2d 989 (Rev. Bd. 1983) (good cause found for main studio location amendment). Consequently, the application of BDC, the only remaining basically qualified applicant in this proceeding, was properly granted.

8. ACCORDINGLY, IT IS ORDERED, That the appeal filed March 12, 1984 by Kravetz Media Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Financial Qualifications
Summary Decision

Where applicant withdrew certification of financial qualification and offered instead belief that "God will provide him with the necessary funds." ALJ correctly dismissed his application for failure to meet Commission's financial qualification requirements. Applicant's constitutional claims were rejected as meritless.
—*Central Alabama B/cers, Inc.*
MM Docket No. 83-536

FCC 84R-27

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of CENTRAL ALABAMA BROADCASTERS, INC. Selma, Alabama For Renewal of License of Station WSLA-TV Selma, Alabama and	MM Docket No. 83-536 File No. BRCT-811201KY
JAMES L. OYSTER Selma, Alabama For Construction Permit	MM Docket No. 83-537 File No. BPCT-820301KE

Appearances

James L. Oyster, pro se; and *Irving Gastfreund*, on behalf of Central Alabama Broadcasters, Inc.

DECISION

Adopted: April 27, 1984; Released: May 2, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the application of Central Alabama Broadcasters, Inc. for renewal of license of Station WSLA-TV, Channel 8, Selma, Alabama, and the mutually-exclusive application of James L. Oyster to construct a new television station on the channel presently occupied by WSLA-TV. The applications were designated for hearing on a standard comparative issue (*Hearing Designation Order*, MM4763, released June 17, 1983); the Presiding Adminstrative Law Judge Joseph P. Gonzalez (ALJ) thereafter enlarged the issues to add a financial qualifications issue against Oyster. (*Memorandum Opinion and Order*, FCC 83M-4461, released December 1, 1983). In a *Summary Decision (S.D.)*, FCC 83D-72, released December 30, 1983, the ALJ found that Oyster had offered no evidence whatever that he would provide the necessary financing for his proposal. Accordingly, the ALJ granted Central Alabama's motion for summary decision; in addition, he dismissed Oyster's application, and granted Central Alabama's renewal application. We have reviewed the *S.D.* in light of Oyster's exceptions, Central Alabama's reply brief, and the record.

2. As the ALJ explains in the *S.D.*, although Oyster had originally "certified" on his application form that he was financially qualified under the relevant Commission standard,[1] he subsequently amended his application by withdrawing his certification. *S.D.*, para. 2. While acknowledging that the certification withdrawal placed him out of compliance with the Commission's financial qualification requirements, *see id.*, he offered instead his "belief" that "God will provide him with the necessary funds." *Id.*, at para. 8. Rejecting that "belief" as a basis for meeting the financial issue caused by the certification withdrawal, the ALJ dismissed Oyster's application with prejudice. *Id.* , at para. 10. He concurrently granted the renewal application of Central Alabama, which had already expended heaven-knows-what on this "comparative renewal" proceeding.

3. Before the Board, Oyster appeals his dismissal on the same grounds as urged before the ALJ,[2] and he contends that the ALJ's refusal

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[1] The standard for meeting the Commission's financial requirement is set forth in *New Financial Qualification Standard for Broadcast Television Applicants*, 72 FCC 2d 784 (1979). Recent applicants need no longer tender documentary evidence of their financial resources, but may now merely "certify" that they have the finances necessary to meet the Commission's standard. *Revision of Application for Construction Permit for Commercial Broadcast Stations*, 50 RR 2d 381, 382 (1981). As noted, Oyster had originally so certified. *S.D.*, para. 2.

[2] In part, Oyster contends:

> The Lord spoke to Oyster and said that he would receive all the money necessary to finance this television station. In fact, the Lord has told Oyster that he will have more money for this ministry than any ministry in the history of the world, and that all of its needs will be supplied by the Lord according to His riches in glory. This is the living word of God spoken to Oyster's heart and has the same force and authority

to accept his "belief" that "God will provide" in lieu of an operative certification is a violation of his First Amendment right of religious freedom.[3]

4. For the reasons adequately set forth in the *S.D.*, we affirm the ALJ. While it is bruited that the financial "certifications" of many recent broadcast applicants are based upon premises no more objective than Oyster's,[4] such speculation must remain for the present in the apocrypha. We decline to intervene on Oyster's behalf where the Commission's commandments direct otherwise. *See supra* note I. Oyster's relief, if any, must come from a higher authority.

5. ACCORDINGLY, IT IS ORDERED, That the application of Central Alabama Broadcasters, Inc. (File No. BRCT-811201KY) for renewal of license of Station WLSA-TV IS GRANTED, and the application of James L. Oyster (File No. BPCT-820301KE) IS DENIED.

FEDERAL COMMUNICATION COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

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as His word that caused light to be. Every bank in the world could write Oyster a letter saying that they would supply his needs; yet every bank in the world could collapse just as many banks collapsed during the Great Depression.

Oyster Exceptions at 1-2.

[3] *Id.*, at 2-7. These constitutional claims are meritless. *See generally Faith Center, Inc.*, 82 FCC 2d 1, 17-21 (1980), *aff'd* 679 F.2d 261 (D.C. Cir. 1982) (mem.), *cert. denied*, 103 S. Ct. 1188 (1983); *Kings Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 996.

[4] *See, e.g., Oscar Jerome Green* (MM Docket No. 83-1407 *et al.*), FCC 84M-1112, released March 5, 1984 (ALJ) (financial issue added where applicant with "at least" 24 other broadcast applications pending merely certified financial ability). Although the certifying applicant therein stated that he would "submit a financial statement at any time the Commission requests," *id.*, at para. 16, that applicant—apparently lacking Oyster's faith—withdrew when the relevant issues were added. FCC 84M-1558, released March 29, 1984 (ALJ).

AM Station, Operating Hours
Daytime Station
Operation, Hours of Daytime-Only
Post-Sunset Operation
Sunset

Petition for reconsideration granted to an extent and otherwise denied. Section 73.99 of the Commission's Rules amended to permit Class III daytime-only stations to use higher power during post-sunset operation. Section 73.1725(d) governing disputes concerning nighttime resumption of operation by limited-time stations during hours when co-channel Class I station is not operating deleted.
—*Daytime AM B/c Stations*
BC Docket No. 82-538

FCC 84-157

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	
Hours of Operation of Daytime-only AM Broadcast Stations	BC Docket No. 82-538 RM-3938
Amendment of Section 73.81 of the Commission's Rules (Hours of Operation of Dominant and Secondary Stations).	Docket No. 18421[1]

Memorandum Opinion and Order

Adopted: April 11, 1984; Released: April 13, 1984

BY THE COMMISSION:

Introduction

1. The Commission has before it a Petition for Reconsideration of the *First Report and Order* in this proceeding 195 FCC 2d 1032 (1983), 48 Fed. Reg. 42944, published September 20, 1983, which was filed by the

[1] We have included the matters outstanding in Docket No. 18421 for disposition in this document. These matters are discussed below.

Daytime Broadcasters Association ("DBA") and responsive pleadings.[2] In addition, the Commission intends to reconsider certain other matters in this proceeding on its own motion. They are discussed below.

2. This proceeding was begun with a combined *Notice of Proposed Rule Making* and *Notice of Inquiry*.[3] As a whole, the proceeding focused on possible rule and policy changes which could help to alleviate some of the difficulties affecting daytime-only AM broadcasters because they are licensed only for operation from local sunrise to local sunset.[4] The rule making portion dealt with specific rule changes to permit for the first time operation beyond local sunset and to extend the opportunity for pre-sunrise operation by certain Class II stations. Both of these matters were resolved by the *Report and Order*.

3. In the *Report and Order* the Commission decided that it was possible to permit post-sunset operation.[5] This conclusion was based on the fact that during the transitional period, the potential for interference was notably less than during full nighttime conditions. Taking this into account it was possible to measure the potential for interference and, in most cases, to allow post-sunset operation without causing interference. In fact, that is what the Commission did. Class III stations were permitted to operate two hours beyond local sunset with up to 500 watts power, reduced as necessary to avoid interference. Most Class II stations (those on clear channels) also got post-sunset authority on a non-interference basis. The specific powers varied during the two-hour post-sunset period depending on protection requirements, and in some cases, post-sunset operation was curtailed or for a few was not possible at all.

4. The *Notice of Inquiry* proposed to explore a range of other ways of helping daytime-only stations obtain nighttime operation either on their

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[2] Letters of support for the petition for reconsideration were filed by several daytime-only stations. Oppositions to the petition were filed by the Association for Broadcast Engineering Standrads ("ABES"), the American Broadcasting Companies ("ABC"), Clear Channel Broadcasting Service ("CCBS"), Cox Communications ("Cox"), Bonneville International, licensee of Station KSL, Salt Lake City, Utah, ("KSL"), and Multimedia Radio ("Multimedia").

[3] 47 Fed Reg. 38937, Published September 3, 1982.

[4] This limitation arises from the fact that at night the ionosphere reflects AM signals back to Earth hundreds or even thousands of miles away, thereby causing a much greater potential for interference. This means that many stations that are able to operate during the day without causing interference would cause considerable interference if they were to continue that operation at night. However, because the shift from day to night conditions occurs gradually during a transitional period, it is possible to permit some operation during this period without causing interference. Further explanation of AM propagation and related matters is contained in the *Report and Order* (see paras. 2-12).

[5] Reconsideration, however, has not been sought regarding the Commission decision to enlarge the opportunity for pre-sunrise operation by certain Class II stations, and no further consideration will be given to this matter.

own or another AM channel or on an FM channel. In the *First Report and Order* the Commission decided to defer these issues for subsequent consideration. These matters are discussed in a subsequent section of this document.

PETITION FOR RECONSIDERATION

5. The DBA petition for reconsideration commended the Commission for its action, but it said that some additional steps should be taken to alleviate the difficulties faced by the daytime-only stations. Specifically, it urged the Commission to amend the manner in which diurnal curves will be used to calculate protection requirements imposed on Class II daytime-only stations during the two hour post-sunset period to take into account the effect of the diurnal variation on the protected contour of a Class I station on the frequency. DBA argued that such diurnal calculation are possible to make and are not unduly complex or impracticable as the Commission stated. According to DBA, this is an important matter as it objects to protecting the Class I station's 0.5 mV/m 50% signal in the period before a signal of this intensity is generated.

6. For Class III daytime-only stations DBA argued that the Commission's "worst-case" approach to determine the power to use during the entire post-sunset period is too limiting. Instead, it urged periodic recalculations or averaging the time rather than using "worst-case" which it believes over protects the full-time stations during part of the post sunset period. Finally, DBA objects to the Commission's decision not to entertain waiver requests from Class III daytime-only stations seeking a power of 500 watts based on a showing that a station has operated with this power for years during the pre-sunrise period without causing undue interference to full-time stations. DBA asserts that it is unfair to refuse to consider such requests when the Commission did agree to consider interference objections filed by full-time stations.

7. DBA notes the Commission's concern that persons in remote areas of the United States do not have adequate radio service, but it says this concern should be allayed by the fact that commercial shortwave radio is increasingly available in the United States. DBA contends that shortwave is equally well suited to the type of extended area service the Commission is trying to achieve with AM radio skywave service, and more commercial radio receivers now include one or more short wave bands at no extra cost.[6]

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[6] Finally, DBA noted that the Commission did not address in its *First Report and Order* the various proposals raised in the *Notice of Inquiry*. DBA urged the Commission to act expeditiously on a number of these proposals. Support on this point came from opposition filings as well and, as noted earlier, the Commission on its own motion has decided to act on these matters here.

8. The Association for Broadcast Engineering Standards ("ABES") filing was typical of the oppositions in asserting that the Commission responded as generously as possible to the pleas of daytime-only AM stations for some measure of operating authority in the post-sunset period. ABES and the others insisted that additional relief would be unwarranted. On the issue of the use of the diurnal curves in determining the location of the protected 0.5 mV/m, 50% skywave contours of Class I stations, ABES notes that the Commission considered the merits of DBA's proposal but rejected it because of valid concern about the administrative burden involved and the need for consistency with our international agreements regarding Class I services. According to ABES, DBA makes no factual showing why the Commission should now reserve its conclusions in that matter.

9. ABES also disputes the appropriateness of employing a system of varying operating powers for daytime stations during the course of the post-sunset period, asserting that once again DBA is presenting a matter which had been rejected earlier becuase it would increase the technical and operational complexity of post-sunset service and would increase the potential for destructive interference to full-time services. Here, too, ABES insists that DBA has failed to provide any new facts or technical showings to alter the Commission's resolution of this issue.

10. Finally, the opponents assert that the Commission should not adopt a policy of granting waivers to permit post-sunset operations in excess of that permissible under the general rule in the absence of any studies upon which the Commission could possibly justify a different result in the public interest. According to ABES, the burden of presenting facts which show that reconsideration of any element of the *First Report and Order* is necessary or desirable rests upon DBA. ABES submits that DBA has failed to sustain that burden.

11. Several other points were added by CCBS. In particular, it disputed the relevancy of short wave. It noted that few Americans are capable of receiving such signals which, in any event, under current Commission rules can only be used to provide international rather than domestic service. In addition, CCBS believes it was proper to distinguish between objections raised by full-time stations regarding new interference within their coverage areas and requests for higher power by daytime-only stations. In the first case, it says that actual loss of service to current listeners would be involved, rather than a limitation on the ability to extend service to listeners not now relying on the service.

SUPPLEMENT TO PETITION FOR RECONSIDERATION

12. After the cycle of pleadings on the original petition concluded, DBA sought and received leave to file a supplement to its petition for reconsideration. In granting DBA's motion, the Commission provided an

opportunity for other parties to respond to the supplement, and opposition filings were received from ABES, Multimedia, Cox and CCBS. In its supplement DBA changed the approach expressed in the original petition and thereby substantially broadened its request for relief. Instead of adjustments in the powers available during the post-sunset period, DBA requested that all Class III daytime-only stations be able to operate until 6:30 p.m. local time with 500 watts power and that Class II daytime-only stations be given substantially increased power. Class II stations on U.S. Class I-A clear channels would be given a minimum power of 100 watts, and those on U.S. I-B's would be given a minimum power of 250 watts. Class II stations on foreign clear channels would be given the maximum power permitted by treaty, but the Commission was asked to press Canada and Mexico to allow even greater power.

13. In support of these requests DBA asserts that many stations are severely limited in the facilities allowed during the post-sunset period. To them this stems from an excessive level of protection to the service of clear channel stations and to the refusal to allow Class III stations to use the same power (500 watts) in the post-sunset period as they are able to use pre-sunrise. In DBA's view, propagation conditions during the pre-sunrise and post-sunset transitional periods are similar so that there is no basis for not giving the stations the same power post-sunset as they have pre-sunrise. DBA asserts this is just one example of how the Commission has given undue weight to technical data, thereby unnecessarily restricting post-sunset service.

14. The oppositions and the engineering showings in support of them make the same basic point: that the supplement provides no new evidence or even any supportive engineering data on which to base any modification of the Commission's decision. Moreover, they assert that DBA has ignored specific findings of the Commission and without support has reasserted claims previously rejected by the Commission. According to Multimedia, for example, DBA is attempting to discredit the Commission's reliance on technical data by asserting that such data was given undue emphasis. Multimedia insists that the engineering impact of post-sunset operations cannot be ignored but must be at the heart of the Commission's decision making process. Multimedia also rejects the DBA's reference to pre-sunrise operations by daytime-only stations as providing a basis for allowing similar operation in the post-sunset period. According to Multimedia, the key issue is the fact that new interference would be caused not whether specific complaints would be made regarding that interference. Even in the terms in which DBA puts it, Multimedia notes that listeners indeed have objected to the loss of service during the pre-sunrise period. Moreover, Multimedia insists that the absence of complaint provides no basis for action since it indicates no more than that

listeners have become resigned to the loss of service, not that such losses have not taken place.

15. Also, in regard to post-sunset operation by Class II stations, the various opposition engineering statements contradict the DBA assertion that the Commission did not consider the matters of the "distortion zone" or the diurnal variations in the development of the 0.5 mV/m 50% contour of the Class I station. The opponents contend that the Commission considered these points and reached sound conclusions which DBA has failed to rebut. Finally, ABES insists that DBA is incorrect in attempting to depict the basic issues as a choice between distant versus local service. Rather, the effect of the relief sought in DBA's Petition for Partial Reconsideration would be the loss of substantial local groundwave services of fulltime Class III stations. According to ABES, throughout this rule making, DBA has consistently failed to support its various positions and assertions with any technical or other studies to demonstrate the claimed benefits to result from the adoption of its proposals. As opposed to the massive record in this proceeding which documents the damage to occur from the operation of daytime-only stations under nighttime propagation conditions, ABES asserts that DBA's unsubstantiated claims to the contrary cannot be accepted.

DISCUSSION

16. In examining the DBA petition as supplemented, several points become clear. First, because of limitations on their hours of operation, daytime-only stations do indeed face serious difficulties in being able to provide effective service to their communities. Obviously, they are strongly interested in being able to operate with the maximum possible power during the post-sunset period. However, as noted by the opponents, no new engineering or other showing was provided to establish that the specific changes sought by DBA would not cause interference or that the interference losses would be acceptable in light of the new service to be provided. Ordinarily, this would lead to procedural denial of the petition, but we believe it is important to give consideration to the larger issue of the need for additional power for post-sunset operation and the effect such operation would have. Therefore, as was the case with the original decision, the Commission has conducted its own studies and computer calculations to determine whether further relief is appropriate and if so what form it should take. Because of the difference between the situations affecting Class II and Class III stations they are discussed separately.

17. *Class III daytime-only stations.* The *Notice* proposed to allow these stations to operate until 6:00 p.m. local time with a power of 500 watts, the same power as they were able to use pre-sunrise. However, in the *First Report and Order*, the Commission concluded that the record

failed to establish that this was appropriate in light of the serious destructive interference which unrestricted 500 watt operation would produce. Therefore, the Commission decided it was necessary to reduce power below the 500 watt level where necessary to avoid causing groundwave interference.[7] To do this, the Commission did the calculations on a "worst case" basis at the end of the two-hour post-sunset period (SS + 2). Although for many stations this meant that the power was reduced from the original proposal, for all Class III daytime-only stations, the period of post-sunset operation was extended. Instead of ending at 6:00 p.m., post-sunset operation was authorized to continue until two hours after local sunset.[8]

18. Based on a "worst-case" analysis it was necessary to reduce the power for many stations well below the 500 watt level. In fact, a substantial number were reduced below 100 watts. Even though most were able to provide reasonable service even with reduced power, there is no question that the coverage area inevitably was reduced from that available for the same stations during pre-sunrise operation when most Class III stations were able to use 500 watts. That difference has been the cause of much concern and misunderstanding.

19. Many daytime-only stations seem to believe that the Commission based the difference in allowable pre-sunrise and post-sunset powers on a belief that propagation conditions during these two periods differed. Since they thought the two periods to be alike in this regard, they thought there should not be a difference in the authorized powers. Although there are certain propagation differences between the two periods, the distinction in authorized power rested on a quite separate basis. Pre-sunrise power of 500 watts was permitted in 1967, even though the Commission recognized that this could cause serious interference losses. Nonetheless, the Commission was persuaded that extraordinary circumstances warranted accepting such interference. Specifically, the record in Docket No. 14419 contained extensive showings of the need to provide vital weather and school closing information during the pre-sunrise period. This need was shown to be particularly acute during the winter months when the day is shortest. Waiting until sunrise was not a satisfactory alternative if this information were to be disseminated in time. It was because of these emergency-like circumstances that the Commission concluded that pre-sunrise interference losses were justified.

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[7] Class III stations were only required to provide groundwave protection as Class III full-time stations do not provide skywave service.

[8] Implementation of the full period of post-sunset operation awaits completion of negotiations with Mexico. In the meantime, post-sunset operation cannot extend beyond 6:00 p.m. local time.

20. The post-sunset situation is quite different. In contrast to the record developed regarding the need for 500 watts pre-sunrise, the record in this proceeding is essentially devoid of justification for the creation of the extensive interference that would result from an across-the-board use of 500 watts power for post-sunset operations. In part, this difference is due to the fact that the pre-sunrise and post-sunset periods differ in one crucial respect. In the former, the daytime-only station has been off the air all night and thus had no opportunity at all to disseminate the type of vital information noted in paragraph 19, *supra*. Being able to begin at 6:00 a.m. with 500 watts enables the station to perform this service. It is quite different during the post-sunset period because the station has been on the air all day with full power. As a consequence, it has had an ample opportunity to share any needed information with its listeners. Thus, while operation during the post-sunset period is clearly justified when no interference results, there is no apparent or record evidence on which the Commission could conclude that substantial post-sunset interference losses should simply be ignored as asserted by DBA.[9]

21. Nonetheless, while the interference consequences need to be taken into account, it does not follow that the exact balance struck in the *First Report and Order* must be followed. Because this is an important public interest matter involving the provision of as much service as feasible by daytime-only stations to their communities, we have given it a fresh look. Based on our reexamination, we have concluded that it is possible to allow additional power while at the same time taking the impact of interference into proper account.

22. On review we have examined whether use of the "worst-case" approach throughout the two-hour period based on the potential for interference which is reached only during the final moment of that two-hour period is too restrictive in its power limitation effects. While this approach does avoid interference, it also means that power is reduced more than necessary for the full transition period. One alternative we explored involved the approach suggested in the original DBA petition for reconsideration. Under it we would divide the period involved into two one-hour segments with calculations for each based on the "worst case" at the end of each period. This would leave the second hour unchanged, but it would offer some relief during the first hour, again without causing any interference. However, we will not adopt this method because it offers little help to the stations most needing to increase power.

23. Next we considered an alternative involving making the calculation of the power to be permitted using the mid-time of each hour rather

[9] Not only do the losses typically exceed the gains by a factor of 10 to 12, these losses usually occur close to the full-time station's own community of license where its own listeners are concentrated.

than the end of the period in question. Applying this to the first hour of post-sunset operation, the calculation would be made at 30 minutes after sunset (SS + 0.5). Using such an approach results in a relative balance between the excess protection which is provided in the first half of the period and the partial protection which is provided during the second half. At the same time, it permits substantially greater power than would be possible using any type of "worst-case" method. Using this method, many more stations would reach a full 500 watts or the same maximum power they use daytime.[10] Many others will obtain substantial powers of 200, 300 or even 400 watts. While using mid-time calculations does permit some interference to occur, it still takes such interference into account and places a reasonable limit on how much can occur. Overall, we believe that using a mid-time calculation balances matters fairly between the needs of these daytime-only stations for additional power while avoiding excessive interference to the service of full-time stations. The rules adopted in the *Report and Order* will thus be modified accordingly.

24. Although most stations will obtain substantial powers as a result of this change, some of them would still be below 100 watts. It is this group that faces the greatest difficulty in providing effective post-sunset service. To deal with this problem, we believe it is appropriate to provide a 100 watt minimum power for use during this post-sunset period by all Class III daytime-only stations, except when doing so would cause interference to a foreign station. Although this would create some additional interference, the amount would be modest because many of these stations already would be near this 100 watt level under our revised approach. Even for those few cases where the interference effect would be greater, this occurs because the station otherwise would have to operate with a highly restricted power. Thus, these are the very stations most in need of the additional power made possible by the 100 watt minimum.

25. The next point to consider is the period during which these enhanced powers would be available. We believe that Class III daytime-only stations should be able to use the power calculated for this first hour until 6:00 p.m., even if that extends beyond one hour. While it is true that some additional interference would occur, we do not believe that it would create unacceptable losses under the circumstances. First of all, this approach is self-limiting. Because this operation would be limited to 6:00 p.m., this means that it would be used only during a few months of the year. Even during those months when it does apply, the increment could well be as little as 15 or 30 minutes. The largest effect would be felt in December when the days are shortest, but even then, the impact would

[10] Some stations are licensed for 250 watts operation and thus cannot be expected to get more power in the post-sunset period than they are licensed to use daytime.

really be significant only in the northern tier of states. However, it is in these localities that the need is greatest and the restrictions on operation by daytime-only stations are the most severe.

26. Being able to operate more effectively during this period has an additional benefit for daytime-only stations. They will be able to generate substantially improved revenues in the Christmas selling season and thereby become a more effective competitor in the market. These benefits accrue to the public as well because the stations's ability to serve its audience would be improved. For all these reasons we believe that this modest extension of the first-hour operations is warranted. Because it is keyed to the needs of the station and its audience when the days are shortest, it is appropriate to key the calculations involved to the interference situation in December. While separate calculations could be made for each month, this would be needlessly complicated and would also be inconsistent with our desire to generally limit "worst-case" interference to December. Likewise, we could base the calculation on the "worst-case" month, but this makes no sense if the month involved is unaffected by this type of operation. Thus, use of December calculations seems most appropriate.

27. On the other hand, the period after 6:00 p.m. is quite different. Although it is technically possible to use a mid-time calculation for the second hour as well, there is no showing of public benefit to justify the significant interference it would create. None of the compelling reasons for an adjustment in the pre-6:00 p.m. period apply here. Moreover, the effect of such operation would occur throughout the year and could affect reception until 10:30 p.m. or even later. Although we believed that it was sensible to allow operation beyond 6:00 p.m., the premise for allowing the additional period of operation until two hours after sunset was that it was possible to do so without causing interference. With this in mind we negotiated an agreement with Canada that contains a provision allowing operation to extend for two hours beyond local sunset. Efforts continue to reach a similar agreement with Mexico. While we remain committed to this goal, there is no basis for special treatment in the period after 6:00 p.m.[11]

28. Since there is no support in the record for any change in the power which should be available after 6:00 p.m., and any increase would result in new interference, we shall leave those powers generally unchanged from the values shown on the notifications already sent to these stations. However, new authorizations will be sent that will reflect the other

[11] Although the most recent proposal of DBA suggests use of a 6:30 p.m. dividing line, an extension to 6:30 p.m. was not proposed in the *Notice*, nor was it the subject of comment by the parties. Therefore, we believe it is inappropriate to consider such an extension on reconsideration for the first time. See 47 C.F.R. § 1.429.

changes we are making herein. In the meantime, the current notification can be relied on to describe the power available after 6:00 p.m. when such operation becomes possible after Mexican agreement has been obtained. Calculations will be made and new notifications will be sent so that stations can prepare to employ the greater power we are authorizing when sunset again occurs before 6:00 p.m. this fall. The new authorizations will contain both powers: the first which can be used until 6:00 p.m. local time and the second (which is calculated on the same technical basis as that now authorized) which can be used after 6:00 p.m. Section 73.99 will be amended to reflect these changes.

29. *Class II Stations.* DBA has objected to the degree to which the Commission found it necessary to restrict the operating powers of Class II daytime-only stations during the post-sunset period. DBA argued that these stations should be permitted to operate during the post-sunset period with the same power levels as those permitted during the pre-sunrise period. Here again the foundation of DBA's argument is its claim that propagation conditions during the two periods are essentially the same. From this DBA concludes that the interference during PSSA operation would be no worse than during PSRA operation.

30. We do not agree with this argument because it fails to take into account the fact that the east-west time relationship between daytime-only stations and co-channel Class I stations is reversed from morning to afternoon. This reversal results in the need for substantially different protection requirements during the two periods. Because of such differences some stations that have never qualified for PSRA operation are able to qualify for PSSA operation. Likewise, some that operate pre-sunrise with substantial power may have reduced power post-sunset or even none at all.

31. DBA repeats its argument that was made in earlier comments in this proceeding that protection to the protected skywave contour of Class I stations should be limited to the contour that is calculated using diurnal factors at various times of the transitional period. This is an issue that was discussed in detail in the *First Report and Order* in paragraphs 37 through 40 where the Commission expressed its concern regarding the cumulative effects of large numbers of daytime-only stations that could result in excessive interference to the skywave service of Class I stations. Some commenting parties had recommended use of the RSS principle in dealing with such cumulative effects. The Commission chose instead to compensate for these effects by adopting rules that assumed that the 0.5 mV/m skywave contour of Class I stations are fully developed at sunset at the Class I station's site. This provides a margin of safety which the Commission believed to be adequate. Several commenters to the Petition for Reconsideration have expressed their views that this approach was a

practical and balanced treatment of this issue. On the other hand, DBA has offered no factual showing and we perceive no overriding public interest benefit that would convince the Commission to alter its decision on this issue.

32. Similarly, DBA raises the issue of skywave phase distortion which results in the so-called "distortion zone" and asserts that the Commission has never officially taken it into consideration in the determination of any issues pertaining to Clear Channel station service. DBA seems to overlook the fact, however, that this is an issue that the Commission discussed in considerable detail in its *First Report and Order* in paragraphs 44 through 47. Upon review of the Report it will be noted that the existence of the distortion zone was in fact used as partial justification for the adoption of rules that permitted greater interference at the 0.1 mV/m groundwave contour of Class I stations than would normally be permitted. The rules adopted permitted interfering signals at the 0.1 mV/m groundwave contour of Class I stations to be as high as 25 uV/m, whereas, normally only 5 uV/m is permitted. Here again, DBA failed to submit any technical showing whatever to demonstrate that the Commission's decision on this issue was improper.

33. DBA also argued that Class I-B stations contribute interference to each other during the transitional periods because of their time differences and resulting different modes of operation (i.e., because of time differences one Class I-B station may still be using its daytime antenna system when it is already nighttime at the other Class I-B station). To exemplify this argument, reference is made to the operations of stations WWVA (Wheeling, West Virginia) and KVOO (Tulsa, Oklahoma), both Class I-B stations on 1170 kHz. DBA asserts that when it is one hour before sunrise in Tulsa, FCC skywave curves indicate that the Wheeling station is putting a powerful interfering skywave signal into the Tulsa station's coverage area. It is thus claimed that the interference caused by these stations to one another would be worsened only very slightly, if at all, if daytime-only stations (operating on the Class I-B channels) were permitted to operate with 250 watts until 6:30 PM local time. However, DBA failed to submit any technical showings which would support such an assertion. On the other hand, Clear Channel Broadcasting Service ("CCBS") submitted interference studies that showed that Class II-D stations operating with 250 watts would cause serious loss to Class I stations of both skywave as well as groundwave services. Using the example of WWVA and KVOO chosen by DBA, it was shown that daytime-only station, KJAS, Jackson, Missouri, operating with 250 watts would cause KVOO to lose 29.2% and 40.9% of its skywave and nighttime groundwave service, respectively. WWVA would lose 35.8% and 30.5% of its skywave and nighttime groundwave service respectively. Further-

more, there is no reason to believe that such a condition would be an isolated instance. Similarly, DBA proposed that daytimers on the Class I-A Clear Channels would be permitted to operate with a minimum power of 100 watts. Here also, however, CCBS demonstrated with interference studies that such operation would result in substantial interference to both skywave as well as nighttime groundwave service of Class I-A station.

34. Because of the above circumstances it is not possible to provide relief for daytime-only Class II stations along the lines that have been urged. Further we cannot sanction increased power without causing devastating interference losses both groundwave and skywave services as illustrated in a map attached as an appendix. It shows the effect of a 50 watt proposed operation in North Carolina on a Chicago station. Particularly noteworthy is the extensive losses of groundwave coverage in the Chicago area itself.

35. Although across-the-board relief for Class II stations is not possible, we can provide relief for a significant group of stations. For the daytime-only stations of foreign clear channels, we can increase their power by doing the calculations at the end of each hour during the two hour post-sunset period. When Phase 1 for a daytime-only station on a domestic Class I clear channel greatly exceeds one hour, we will similarly perform the calculation when it is seen to be advantageous to the daytime-only station. In both instances, it should be emphasized that these are "worst-case" calculations for the period in question.

THE NOTICE OF INQUIRY

36. We address here the separate proposals that we made the subject of inquiry in the belief that further comment and consideration were needed before they would be ripe for decision as to whether rule making should be instituted on them.

37. *Allocations Restrictions in Section 73.37(e)(2) of the Rules.* We invited comments on the desirability of amending Section 73.37(e)(2) of the Rules so as to permit the licensees of daytime-only stations to apply for unlimited-time stations on the Class I-B Clear Channels and on the 41 Regional Channels without having to make the showings generally required by that subsection, e.g., the provision of a first primary service or a first or second local service. On further reflection, we believe it more appropriate to consider that mode of possible relief to daytime-only stations together with other pending proposals for the amendment of the same rule. For example, the National Radio Broadcasters Association referred to RM 3683, its pending petition that the threshold requirements of that rule be discontinued altogether. Accordingly, we shall take the comments filed in BC Docket No. 82-538 into account in considering the broader proposal that we do away with Section 73.37(e) altogether.

38. *Preference for Daytime-only Stations Seeking FM Assignments.* We have decided to deal with this issue in our consideration, in MM Docket No. 84-231, of proposed rule changes affecting the assignment of FM channels. Persons wishing to comment further on it may do so in response to an outstanding *Notice of Proposed Rule Making* in that docket.

39. *Preference for Daytime-only Stations Seeking Unlimited-Time AM Assignments.* Most of the considerations affecting this question also arise under the preceding questions of possible preferences to daytime-only stations seeking FM assignments. The two should be decided consistently. We therefore think it desirable to defer deciding upon the AM aspect of this question until we reach our decision in MM Docket No. 84-231, in which rule making on the FM aspect of the question is now pending.

40. *Expedition of Petitions to Assign FM Channels.* We agree with the comments of parties who felt that the timing involved in the rule making process involving the assignment of FM channels is not sufficiently directly related to the need of daytime-only stations to warrant changing the processing of petitions to assign or reassign FM channels in this manner. We accordingly will not pursue this possibility further.

41. *Low Power FM.* We have had under consideration other proposals to establish a low power FM service, including the petition of the Moody Bible Institute, RM-3914. In a separate action today the Commission has decided not to pursue this matter. In light of that decision regarding the generic question of permitting low power FM, we do not believe that it is appropriate to pursue low power FM in the presently limited context.

42. *Low Power AM Operation during Nighttime Hours.* This proposal, to permit daytime-only stations to operate during nighttime hours at powers not exceeding 500 watts that would protect other stations, was supported by the Daytime Broadcasters Association, individual daytime broadcasters, and NTIA, while others qualified their support with admonitions that more study is needed, and some comments flatly opposed this step. Concerns as to the need for care to assure adequate protection to unlimited-time stations were expressed by several parties including the National Radio Broadcasters Association. Others, including the National Association of Broadcasters, believed it to be improbable that protection requirements would permit daytime-only stations adequate power to render useful service if permitted nighttime operations beyond permitted pre-sunrise and post-sunset operation. We find merit in the suggestion of NAB that we can better direct our energies at this stage to other means of affording relief that promise greater benefits with fewer potential drawbacks. In these circumstances, we believe it desirable to defer further action on the AM low power until its potential advantages

and disadvantages and the need for it can be reviewed further in the light of experience with the improvements that may be realized from the other measures that have been adopted in the rules.

43. *Use of Local Channels.* We have not found in the comments persuasive reasons for initiating rule making at this time on the proposal that daytime-only broadcasters be permitted to switch to local channels at night. The six local channels are already crowded, with as many as 170 unlimited time stations already operating on individual local channels. The record refers to the dual disadvantage of creating still greater crowding on these channels, while not being able to provide sufficiently meaningful scope for nighttime operations by daytime-only broadcasters on the local channels. We, accordingly, are not persuaded that it would be desirable to conduct rule making on this proposal.

OTHER MATTERS

44. *Docket No. 18421 Issues* We have also considered the separate matter of our proposal, in Docket No. 18421, to amend Section 73.81 of our Rules (an old AM rule since redesignated as Section 73.1725(d)), that prescribes procedures to be followed when limited-time stations and co-channel Class I (clear channel) stations disagree as to a definite time when the limited station may resume broadcasting during nighttime hours when the Class I station is not operating. The proposal, which was announced in a *Notice of Proposed Rule Making* adopted January 15, 1969, 34 Fed. Reg. 1059, addresses circumstances which no longer exist. We are aware of no instance in which a Class I station that is co-channel with any of the 16 limited-time stations is silent during nighttime hours when a limited-time station would have interest in resuming operations. We ceased licensing new limited stations in 1959. The circumstances underlying the rule being non-existent, we revoke Section 73.1725(d) and terminate Docket No. 18421. In the very unlikely event that further changes in broadcast practices give rise to questions concerning operations by any of the 16 pre-1959 limited-time stations during nighttime hours when a co-channel Class I station is not operating, we would deal with the matter *ad hoc*, without going through the procedures of Section 73.1725(d), which are obsolete both as prescribed in the rule, and as we proposed, in 1969, to amend it.

45. Accordingly, the Rules will be amended as indicated in the previous discussion, and both proceedings will be terminated.

46. Authority for this action is contained in Sections 303 and 307(b) of the Communications Act of 1934, as amended.

47. IT IS ORDERED, That, the Petition for Reconsideration filed by the Daytime Broadcasting Association IS GRANTED to the extent indicated and in all other respects IS DENIED.

48. IT IS FURTHER ORDERED, That, Section 73.99 of the Commissions's Rules IS AMENDED as set forth in the attached Appendix, effective May 21, 1984.

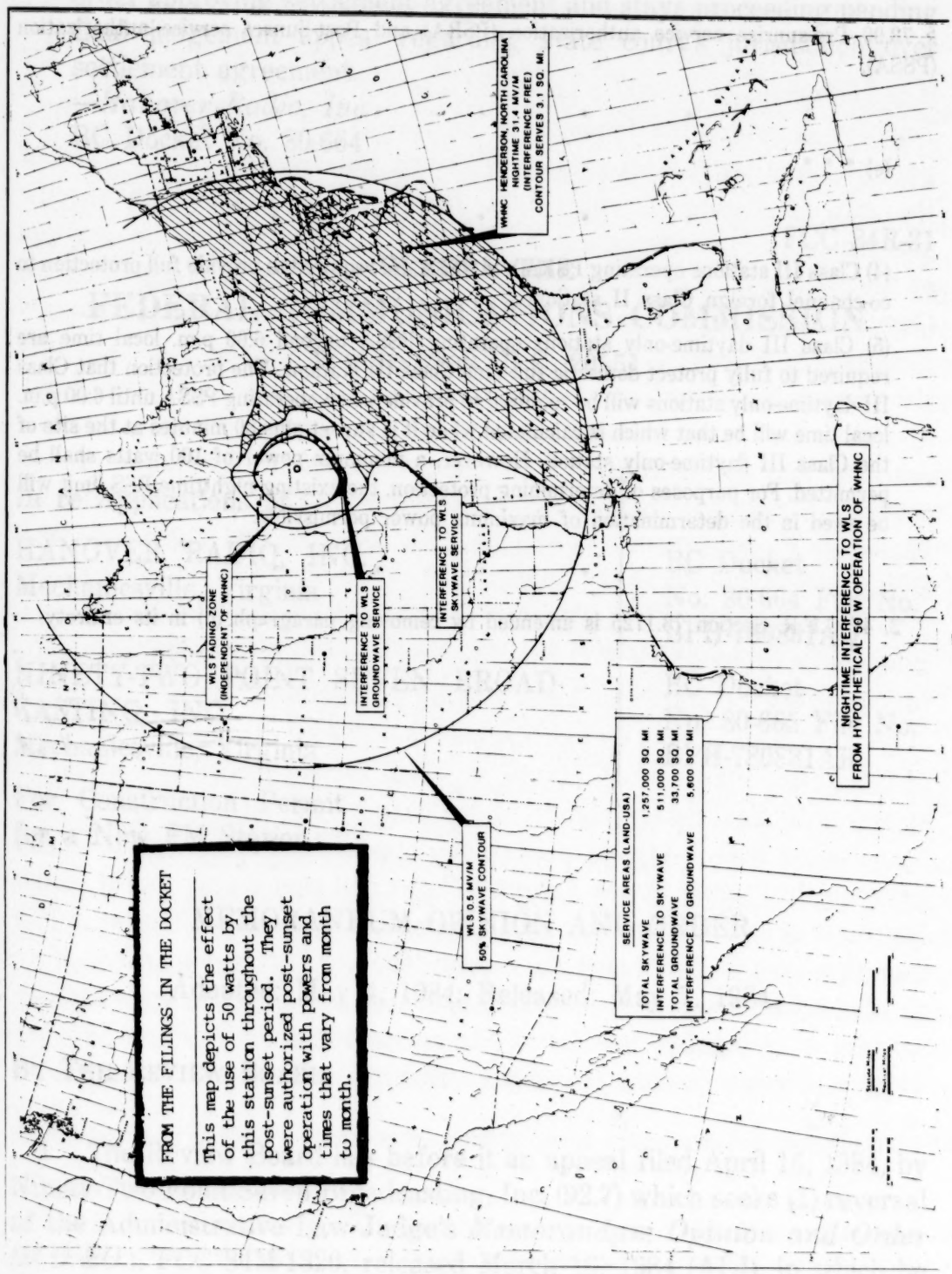
49. IT IS FURTHER ORDERED, That, the proceeding in BC Docket No. 82-538 IS TERMINATED.

50. IT IS FURTHER ORDERED, That, Section 73.1725(d) of the Rules IS DELETED.

51. IT IS FURTHER ORDERED, That, the proceeding in Docket No. 18421 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*


WHNC HENDERSON, NORTH CAROLINA
NIGHTIME 31.4 MV/M
(INTERFERENCE FREE)
CONTOUR SERVES 3.1 SQ. MI.
WLS FADING ZONE
(INDEPENDENT OF WHNC)
INTERFERENCE TO WLS
GROUNDWAVE SERVICE
INTERFERENCE TO WLS
SKYWAVE SERVICE
WLS 0.5 MV/M
50% SKYWAVE CONTOUR
SERVICE AREAS (LAND-USA)
TOTAL SKYWAVE 1,257,000 SQ. MI.
INTERFERENCE TO SKYWAVE 511,000 SQ. MI.
TOTAL GROUNDWAVE 33,700 SQ. MI.
INTERFERENCE TO GROUNDWAVE 5,600 SQ. MI.
NIGHTIME INTERFERENCE TO WLS
FROM HYPOTHETICAL 50 W OPERATION OF WHNC
FROM THE FILINGS IN THE DOCKET
This map depicts the effect of the use of 50 watts by this station throughout the post-sunset period. They were authorized post-sunset operation with powers and times that vary from month to month.

APPENDIX

1. 47 C.F.R. Section 73.99 is amended by revising subparagraph (e)(4) and by adding a new subparagraph (e)(5) to read as follows:

§ 73.99 Pre-sunrise service authorization (PSRA) and Post-Sunset service authorization (PSSA).

* * * * *

(e) * * *

* * * * *

(4) Class III stations operating PSRA and PSSA are required to provide full protection to co-channel foreign Class II stations.

(5) Class III daytime-only stations operating PSSA beyond 6:00 p.m. local time are required to fully protect domestic full-time Class III stations. The protection that Class III daytime-only stations will be required to provide when operating PSSA until 6:00 p.m. local time will be that which is calculated when it is sunset plus 30 minutes at the site of the Class III daytime-only station. However, a minimum power of 100 watts shall be permitted. For purposes of determining protection, the existing nighttime RSS limit will be used in the determination of maximum power permissible.

* * * * *

2. 47 C.F.R. Section 73.1725 is amended by removing paragraph (d) in its entirety.

Action Appealable Settlement Stay

Review Board denied appeal but on its own motion sets aside ALJ's order approving settlement agreement and stays proceeding pending final judgement appeal regarding state court's jurisdiction over settlement agreement.
—*Hanover Radio, Inc.*
BC Docket No. 80-664

FCC 84R-31

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
HANOVER RADIO, INC. Mechanicsville, Virginia	BC Docket No. 80-664 File No. BPH-780831AQ
NINETY-TWO POINT SEVEN BROADCASTING, INC. Mechanicsville, Virginia	BC Docket No. 80-665 File No. BPH-780831AR
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1984; Released: May 7, 1984

BY THE REVIEW BOARD:

1. The Review Board has before it an appeal filed April 16, 1984, by Ninety-Two Point Seven Broadcasting, Inc. (92.7) which seeks (1) reversal of the Administrative Law Judge's *Memorandum Opinion and Order (M.O.&O.)*, FCC 84M-1320, released March 16, 1984 (ALJ), in which he approved a settlement agreement, dismissed 92.7's application, granted the application of Hanover Radio, Inc. (Hanover), and terminated the proceeding; and (2) a stay of this proceeding pending a ruling by the Supreme Court of the United States on an appeal to be brought by 92.7

from enforcement of the settlement agreement.[1] For the reasons set forth below, we will deny 92.7's appeal, but, *sua sponte* , set aside the ALJ's grant of Hanover's application and impose a stay.

2. This appeal is a continuation of litigation stemming from 92.7's March 1982 attempted withdrawal from a settlement agreement between it and Hanover, under which appellant was to receive reimbursement from Hanover in return for dismissal of its application. On August 17, 1982, pursuant to a lawsuit brought by Hanover, the Virginia Circuit Court of the city of Richmond ruled that Hanover was entitled to specific performance of the agreement and it directed 92.7 to continue prosecution of the settlement agreement before the Commission.[2] 92.7's appeal of the Circuit Court's order to the Virginia Supreme Court was ultimately dismissed on February 6, 1984. On March 8, 1984, 92.7 filed a motion with the Virginia Supreme Court for a stay of the Circuit Court's order pending appeal to the United States Supreme Court. On March 16, 1984, the ALJ released his *M.O.&O.* approving the joint request for the proposed settlement agreement, concluding that the applicants had complied with applicable Commission requirements. It is from that *M.O.&O.* that 92.7 appeals.

3. In support of its appeal and request for a stay, 92.7 claims that, subsequent to the ALJ's *M.O.&O.*, the Supreme Court of Virginia issued a further order (on March 22, 1984) staying execution of the Circuit Court's order until May 7, 1984, unless that case is docketed in the Supreme Court of the United States prior thereto, in which event enforcement would be stayed until final determination of the case by the Supreme Court. 92.7 here asserts that it intends to file a full appeal from the Virginia Circuit Court in the United States Supreme Court and that a stay denial would deprive it of an opportunity to own a broadcast license should it prevail. It therefore urges the Board to reverse the ALJ's opinion, allow it to withdraw from the settlement agreement, and to stay further proceedings pending a ruling by the United States Supreme Court regarding the Virginia Circuit Court's jurisdiction over the settlement agreement.

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[1] The Board also has before it an opposition filed April 18, 1984 by Hanover, and a supplement filed April 30, 1984, by 92.7, which, in effect, is a reply to Hanover's opposition. The supplement is an unauthorized pleading since Section 1.301(c)(7) does not permit replies unless specifically requested by the Commission; it is therefore dismissed.

[2] Based upon deference to the state court's order of specific performance, we stayed the FCC proceeding. *Hanover Radio, Inc.*, 91 FCC 2d 849 (Rev. Bd. 1982). The substance of the Board's action was approved by the full Commission. *Ninety-Two Point Seven Broadcasting, Inc.*, 55 RR 2d 607 (1984). It noted the Board's stay, *id.*, at n.7, and affirmed that "the Virginia state courts have the power to decide whether Hanover is entitled to specific performance of its contract with 92.7." *Id.*, at 611.

4. For the following reasons, we will deny the stay requested by 92.7 on the ground offered,[3] but, *temporalis*, we will set aside the ALJ's grant of the construction permit to Hanover and his termination of this proceeding. Because of our action hereinbelow, we need only touch briefly on our substantive denial of 92.7's own stay request. As observed in our prior ruling in this proceeding, *Hanover Radio, supra* note 2, the general criteria for the issuance of a stay are articulated in *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F.2d 921, 925 (D.C. Cir. 1959).[4] Based on the Commission's clear ruling in *Ninety-Two Point Seven Broadcasting, supra* note 2, that the disposition of the underlying settlement agreement is a matter for *lex loci* resolution, this Board—as a subordinate body—cannot now find that 92.7 has presented a "serious legal question"[5] with respect thereto, despite its appeal to the United States Supreme Court. Insofar as our present purview of the merits of 92.7's contentions respecting the settlement contract, that matter is decided beyond legal question in this forum.

5. As to 92.7's appeal of the ALJ's approval of the settlement agreement and termination of the proceeding with the grant to Hanover, we note that just 6 days after the ALJ released the *M.O.&O.* here appealed, the Supreme Court of Virginia stayed execution of the lower court's order directing specific performance of the settlement contract.[6] As noted *supra*, both the Board and the Commission have firmly ruled that the status and disposition of the contract matter is for *jus privatum* determination. In the wake of the Virginia Supreme Court's March 22 stay of the Circuit Court's order, it would appear that 92.7 is not currently under a mandate to specifically perform on the settlement agreement and, thus, the contractual matter remains locally *sub judice* for the present. The Commission and the Board having declared deference to *lex loci* jurisdiction over the contract dispute, the ball is now again in the court(s) of Virginia and we shall await its return. In *Hanover Radio*, we stayed these proceedings pending definitive resolution of the contractual matter in the state courts. The matter apparently being unresolved with finality, we will set aside the *M.O.&O.* and, *sua sponte*, reimpose the prior stay granted in *Hanover Radio* for the reasons set forth therein.[7] Should there

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[3] Our denial is, however, effectively moot since we stay the proceeding on our own motion for the reasons explained at para. 5, *infra*.

[4] 91 FCC 2d at 851.

[5] *See Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). *Compare Hanover Radio, supra*, where the party requesting a suspension of the proceeding accompanied its request with the state Circuit Court order directing 92.7 to specific performance of the settlement agreement.

[6] 92.7 Br. at Exh. III.

[7] Indeed, it was Hanover that originally requested a stay pending state court resolution. We granted the stay on that basis. But, that door swings both ways.

be a dissolution of the Virginia Supreme Court stay, the ALJ should, in turn, reinstate the *M.O.&O.* [8]

6. ACCORDINGLY, IT IS ORDERED, That the appeal of Ninety-Two Point Seven Broadcasting, Inc. From Order Terminating Proceedings, filed April 16, 1984, IS DENIED; and

7. IT IS FURTHER ORDERED, That *Memorandum Opinion and Order*, FCC 84M-1320, released March 16, 1984, IS SET ASIDE, and that this proceeding IS STAYED pending final disposition of the Virginia Circuit Court ruling of August 17, 1982 referred to herein.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

[8] Our action, of course, does not reflect on the ALJ since his action preceded the stay issued by the Virginia Supreme Court. Had that court not issued its stay, 92.7's appeal to the United States Supreme Court would have furnished no independent basis for our instant action. *Cf.* 28 U.S.C. §2349(b) (court appeal "does not of itself stay or suspend the operation of the order of the agency").

Application, Dismissal of
Failure to Prosecute
Interlocutory Ruling, Appeal From

Review Board denied appeal from ALJ's ruling dismissing appellant's application. Application dismissed because of the applicant's continuing failure to meet written exchange date. Board found that appellant did not assert legal error or show abuse of discretion on part of ALJ. —*Mad River B/cing Company, Inc.*
MM Docket No. 83-612

FCC 84R-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
THE MAD RIVER BROADCASTING COMPANY, INC. Arcata, California	MM Docket No. 83-612 File No. BPCT-821207KE
Herb Pentzer, Bill J. Tunnell Dolly Reed and Donna Reed, d/b/a PENTREED, LTD. Arcata, California	MM Docket No. 83-614 File No. BPCT-830218KI
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1984; Released: May 18, 1984

BY THE REVIEW BOARD:

1. The Review Board has before it an appeal filed March 26, 1984, by Pentreed, Ltd. (Pentreed) from a ruling by Acting Chief Administrative Law Judge Thomas B. Fitzpatrick (ALJ) dismissing its application; and a motion to strike the appeal, filed April 16, 1984, by the Mad River Broadcasting Company, Inc. (Mad River). For the reasons set forth below, we will deny Pentreed's appeal and dismiss the motion to strike.

2. *Background*: Mad River and appellant Pentreed are mutually exclusive applicants for authority to construct a new commercial television station to operate on Channel 23 at Arcata, California. At the scheduled hearing, held February 14, 1984, the ALJ ruled (at Tr. 29-31)

that Pentreed had failed to prosecute its application and been in default since January 13, 1984, because it did not exchange its written case on that date, as directed by the ALJ both at a September 19, 1983 prehearing conference (Tr. 19-20) and in a subsequent written *Order* released September 23, 1983 (FCC 83M-3327) establishing the procedural schedule. Thereafter, by *Order*, FCC 84M-813, released February 16, 1984, the ALJ dismissed Pentreed's application with prejudice, pursuant to Section 73.3568(b) of the Rules, 47 CFR §73.3568(b), for failure to prosecute its application.[1] It is from that final *Order* that Pentreed appeals.

3. In support of its appeal, Pentreed complains that it has been prejudiced because of its decision to proceed without legal counsel in prosecution of its application.[2] Mad River, which states that it was not served with a copy of Pentreed's appeal, urges that the appeal be struck because of Pentreed's allegedly persistent failure to abide by the Commission rules. Alternatively, Mad River requests that it be permitted an opportunity to respond to Pentreed's appeal on the merits.

4. We will deny Pentreed's appeal because Pentreed does not assert legal error or show abuse of discretion in the ALJ's order dismissing its application.[3] The application dismissal was predicated on Pentreed's continuing failure to meet a written exchange date, and Pentreed has offered no reasonable explanation for its noncompliance. Nor did it timely request relief from the established procedural dates, let alone show good cause therefor. The ALJ was acting well within his delegated authority in dismissing Pentreed's application, *see A.C. Elliott, Jr.*, 56 FCC 2d 351 (Rev. Bd. 1975), and we can cite no basis in law for overturning his dismissal. The fact that Pentreed is not represented by counsel does not dictate a contrary result under the facts of this case or excuse his particular failure to comply with Commission procedures. *See Silver Beehive Telephone Co.*, 34 FCC 2d 738 (1972). The Commission's

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[1] Section 73.3568(b) provides in pertinent part that "[f]ailure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal."

[2] Subsequent to Pentreed's application dismissal, the ALJ granted Mad River's application and terminated the proceeding. *Order*, FCC 84M-1029, released February 29, 1984. Pentreed's appeal includes a challenge to the ALJ's grant of Mad River's application, alleging various acts of misconduct on the part of Mad River. Those allegations will not be considered here because they are outside the scope of the order appealed from which merely dismissed Pentreed's application. The proper vehicle for allegations of misconduct is a timely motion to enlarge issues, *see* 47 CFR 1.229, accompanied by requisite supporting documentation, on the basis of which such allegations can be carefully evaluated. No such motion was filed by Pentreed, and, in any event, the sparseness of the supporting documentation and the vagueness of the relief requested in the appeal precludes serious consideration of any alleged misconduct.

[3] Mad River's motion to strike and alternative request that it be permitted an opportunity to respond to Pentreed's appeal will be dismissed as moot.

procedural rules are designed to achieve a due disposition of the great volume of licensing business before the Commission. *See Geoffrey A. Lapping*, 45 FCC 307 (1962). The disruption to the licensing process caused by blatant noncompliance with these rules is unfair not only to the competing applicant, but – more importantly – to the citizens of Arcata who are entitled to a reasonably prompt initiation of local television service. Our procedural rules, while flexible, are primarily intended to advance the *public* interest in the provision of new broadcast service, and a single applicant cannot disregard those rules at its private convenience. Pentreed was expressly alerted at the outset that it was expected to be familiar with the Commission's basic Rules and Regulation. *Order*, FCC 83M-2193, released July 8, 1983. The ALJ dismissed Pentreed's application only after it became evident that Pentreed was expending little or no effort to prosecute its application. No abuse of the ALJ's discretion has occurred. *Filmway of Wisconsin*, 54 RR 2d 913 (Rev. Bd. 1983).

5. ACCORDINGLY, IT IS ORDERED, That the Motion for Appeal of Grant of Construction Permit, filed March 26, 1984, by Pentreed, Ltd. IS DENIED; and

6. IT IS FURTHER ORDERED, That the Motion to Strike filed April 16, 1984, by the Mad River Broadcasting Company, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

Common Carrier, Specialized Services
Competition, Common Carriers
Reconsideration, Petitions for, Grant of
Rules, Amendment of
Wide Area Telephone Services (WATS)

Petitions for reconsideration of MTS and WATS Market Structure with respect to compensation of operators of local exchanges for using local telephone exchange facilities to originate or terminate interstate or foreign telecommunications granted to an extent and otherwise denied.
—*MTS/WATS Market Structure*
CC Docket No. 78-72

FCC 83-356

BEFROE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
MTS and WATS Market Structure	CC Docket No. 78-72 Phase I

MEMORANDUM OPINION AND ORDER

Adopted July 27, 1983; Released August 22, 1983

BY THE COMMISSION: COMMISSIONER QUELLO ISSUING A SEPARATE STATEMENT; COMMISSIONER DAWSON CONCURRING IN PART AND ISSUING A STATEMENT.

I. *Introduction*

1. On December 22, 1982, we adopted the *Third Report and Order* in this docket ("*Access Charge Order*"),[1] in which we prescribed rules for calculating the charges that end users and interexchange carriers would pay a telephone company after December 31, 1983, for using its facilities with part of all of their costs allocated to the interstate jurisdiction. We now have before us thirty-five petitions asking that we reconsider or

[1] FCC 82-579, released February 28, 1983.

clarify almost every facet of that decision. In this *Memorandum Opinion and Order* we address the issues raised in those petitions.

2. The rules we adopted in the *Access Charge Order* will replace with a single uniform mechanism the existing potpourri of mechanisms through which local carriers recover the cost of providing access services needed to complete interstate and foreign telecommunications. After January 1, 1984, exchange carriers will rely solely upon revenues generated by their interstate access tariffs to recover these costs. The *Access Charge Order* prescribed the rate elements for those tariffs, determined the costs that should be allocated to each of these elements, and prescribed the rate structure of the charges through which telephone companies would recover these costs. The *Order* required that some of these charges be levied on end users directly and others be assessed upon interexchange carriers. The *Order* also established an Exchange Carrier Association that would prepare and file access charge tariffs and administer the revenue pools created by these tariffs. Membership in the association would be limited to telephone companies participating in the access charge revenue pools.

3. The access charge plan reflected our efforts to achieve the proper balance among the four primary objectives of this phase of CC Docket No. 78–72:

(1) Elimination of unreasonable discrimination and undue preferences among rates for interstate services;

(2) Efficient use of the local network;

(3) Prevention of uneconomic bypass; and

(4) Preservation of universal service.[2]

It also represented an effort to preserve an opportunity for fair competition during a transition period in which we and the industry work to eliminate existing inequalities in interconnection options offered interexchange carriers. This docket was instituted for the primary purpose of determining an optimal structure for the MTS–WATS market. The thirty-five petitions for reconsideration of the *Access Charge Order*[3]

[2] As we explained in the *Access Charge Order:* In the context of this proceeding, a "universal service objective" means avoiding actions that would cause a significant number of local exchange service subscribers to cancel this service. *Id.* at para. 86.

[3] Parties filing petitions include: Ad Hoc Telecommunications Users Committee ("Ad Hoc"); American Telephone and Telegraph Company and the Bell System Operating Companies ("AT&T"); Association of Data Communications Users ("ADCU"); Association of Data Processing Service Organizations, Inc. ("ADAPSO"); Alaska and the Alaska Public Utilities Commission ("Alaska"); Bell Telephone of Pennsylvania, *et al.* ("Pennsylvania Bell"); Arthur W. Brothers; Central Telephone Co. ("Centrel"); CompuServe, Inc.;

suggest that we must adjust the access charge plan if we are to achieve the proper balance of these objectives. They urge us to review and revise almost every facet of that plan, including our determination of: (1) How the access elements should be defined; (2) how the costs should be allocated among them; and (3) the mechanisms for filing tariffs, billing charges and distributing revenues. With this brief introduction, we begin the requested reconsideration of our access charge plan, taking into account the issues raised not only in the petitions but also in the numerous oppositions[4] and reply[5] filings made in response to them.[6]

II. *The "End User" Access Elements*

4. In the *Access Charge Order* we defined twelve access rate elements to which the costs associated with providing access services would be allocated. These rate elements fell into two categories based upon whether end users or interexchange carriers would be assessed associated

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Delaware Public Service Commission ("Delaware"); Discount Phone; District of Columbia Public Service Commission ("District of Columbia"); GTE Service Corporation ("GTE"); Illinois Bell Telephone Company, *et al.* ("Illinois Bell"); Illinois Commerce Commission ("ICC"); Maryland People's Counsel; MCI Telecommunications, Inc. ("MCI"); Pacific Telephone and Telegraph Co. ("Pacific"); Pennsylvania Public Utility Commission ("Pennsylvania"); Rochester Telephone Corporation ("Rochester"); Roseville Telephone Utility, *et al.* ("Independent Alliance"); Rock Hill Telephone Company; Rural Electrification Administration ("REA"); Rural Telephone Coalition ("RTC"); Satellite Business Systems ("SBS"); Southern Pacific Communications Company ("SPC"); Tele-Communications Association ("TCA"); Telenet; Tymnet; United States Independent Telephone Association ("USITA"); United States Telephone, Inc. ("U.S. Tel."); United Telephone System, Inc. ("United"); United States Transmission Systems, Inc. ("USTS"); United Technologies Communications Corporation ("UTCC"); and Western Union Telegraph Company ("Western Union").

[4] The following parties filed oppositions to or comments on the reconsideration petitions: ABC, CBS and NBC ("Networks"); Ad Hoc; Altel; Aeronautical Radio, Inc. ("ARINC"); AT&T; CompuServe; Discount Phone; IDCMA; Lexitel; MCI; Michigan Public Service Commission ("Michigan"); North American Telephone Association ("NATA"); National Data Corporation ("National Data"); Independent Alliance; RTC; SBS; SPC; TCA; Telecommunications Association of Minnesota ("TAM"); Uninet; United; Vermont Public Service Board ("Vermont"); Washington Utilities and Transportation Commission ("Washington"); and Western Union. Theodore Brophy, Chairman of the Board of GTE, sent a letter to the Commission addressing issues raised in reconsideration petitions relating to competition and the size of the premium access charge levied on AT&T. AT&T also filed a supplemental opposition on behalf of its interexchange operations (ATTIX). *See* paras. 69–70. *infra.*

[5] Replies were filed by: Ad Hoc; Alaska; AT&T for itself and on behalf of ATTIX; ADAPSO; CompuServe; Discount Phone; General Electric Information Services Company (GEISCO); GTE; MCI; National Data, NATA; Independent Alliance; REA; RTC; SBS; SPC; TCA; Telenet, Tymnet, USITA; USTS; United; and Western Union.

[6] Several persons including residential and business customers of telephone companies have sent letters to Commission officials expressing concern about one or more facets of the *Access Charge Order.* These letters, too, are included in the Docket 78–72 record.

charges. End users would pay charges directly to the exchange carrier (*i.e.*, the local telephone company) for the following three elements: Dedicated Access Line; End User Common Line; and Pay Telephone. Interexchange carriers would be assessed the charges for the remaining access elements: Carrier Common Line; Line Termination; Local Switching; Intercept; Information; Operator Assistance; Common Transport; Dedicated Transport; and Special Access.[7] If a telephone company offered billing and collection or billing information services to interexchange carriers, its carrier's carrier charges would *also* include a Billing and Collection element. In this section of our reconsideration order, we address petitioners' concerns related to end user access elements, beginning with the End User Common Line element.

A. *End User Common Line Element*

1. *The Fixed Charge*

5. The *Access Charge Order* anticipated that eventually a telephone company will recover the interstate revenue requirement associated with the nontraffic sensitive plant linking each subscriber's premises to an end office through a flat monthly charge levied directly on that end user and, when appropriate, through interexchange carriers' payments to the Universal Service Fund.[8] Because this method of recovery is so different from the way in which telephone companies have traditionally recovered the interstate revenue requirement associated with the common line plant,[9] we established a transition plan under which a telephone company would recover a portion of common line costs through fixed charges starting in 1984 and would recover an increasing portion of those costs through fixed charges over a period of years. We also provided for a waiver of end user charges for lifeline subscribers and for monitoring the impacts of end user charges on universal service.

6. The recovery of subscriber line costs was, of course, the central question in the access charge phase of this proceeding and the *Access Charge Order* explains at considerable length the reasons for our decision to establish flat charges. Most petitioners, including petitioners who have questioned the wisdom or necessity of flat charges, have taken that fundamental decision as a given and have suggested a variety of refinements or modification to our plan. A few of the petitioners have, however, asserted that we should reconsider the decision to establish flat

[7] During a transition period interexchange carriers would also pay some surcharges in lieu of end user usage charges for certain services such as collect MTS and Inward WATS.

[8] We discuss charges levied on carriers to recover the costs of subscriber line outside plant *infra* at paras. 64–74.

[9] Traditionally most of these costs have been recouped through the usage sensitive charges levied on MTS calls.

charges of any kind. That fundamental decision was adopted with the full concurrence of all seven Commissioners after five years of proceedings in which we explored a variety of radically different approaches and received numerous rounds of comments.[10] Few, if any, subjects have received more exhaustive attention in the entire history of this Commission. Although we can understand that others might prefer a different result, we remain convinced that a transition to flat charges that will recover most common line costs is the right choice.

7. The driving force behind our decision to move toward flat changes is our commitment to promoting efficient use of the nationwide telecommunications network and our recognition that pricing reform is necessary to enable our society to maximize its efficient use of the telecommunications network and realize the benefits possible from increasing competition in the interexchange marketplace. Artificial pricing structures, while perhaps appropriate for use in achieving social objectives under the right conditions, cannot withstand the pressures of a competitive marketplace. We see the imposition of moderate flat charges on telephone subscribers as an effective, orderly and fair means of guiding telecommunications pricing in the direction which it inevitably must take, toward efficient, cost-based rates. The concept that users of the local telephone network should be responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness. It assures that ratepayers will be able to make rational choices in their use of telephone service, and it allows the burgeoning telecommunications industry to develop in a way that best serves the needs of the country. The telecommunications revolution will yield great wealth in the future and enhance our country's standing in the world community. We are entering an information age which can spawn new businesses and industries, enable traditional industries to modernize their operations and fare better in national and world markets, create vast numbers of new jobs, increase productivity, and dramatically improve the quality of life for the average American through numerous and diverse applications of telecommunica-

[10] This proceeding began in February, 1978 with the issuance of a Notice of Inquiry and Proposed Rulemaking (the "Initial Notice"), 67 FCC 2d 757 (1978). Four subsequent notices of inquiry followed. *See* Supplemental Notice of Inquiry and Proposed Rulemaking ("First Supplemental Notice"), 73 FCC 2d 222 1979), Second Supplemental Notice of Inquiry and Proposed Rulemaking ("Second Supplemental Notice"), 77 FCC 2d 224 (1980); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking ("Third Supplemental Notice"), 81 FCC 2d 177 (1980); and Fourth Supplemental Notice of Inquiry and Proposed Rulemaking ("Fourth Supplemental Notice"), 90 FCC 2d 135 (1982). The comments filed in response to the *Initial, Supplemental, Second Supplemental* and *Fourth Supplemental Notices* related at least in part to access charge questions. We received one set of comments in response to the *Initial Notice*, three sets in response to the *Supplemental Notice*, two sets in response to the *Second Supplemental Notice* and two sets in response to the *Fourth Supplemental Notice*.

tions technology in the home and office. However, a rational efficient pricing structure is necessary for the public to realize these important benefits. We could have maintained the old structure only at the risk of sacrificing or retarding the realization of these benefits.

8. The growth and deployment of bypass technologies underscores the need for prompt action to reform local network pricing practices. In this proceeding, we have been concerned primarily with achievement of an appropriate public interest balance among disparate goals, para. 3 *supra.* One major concern has been that continued inefficient pricing of the subscriber loop could lead to a high level of uneconomic bypass.[11] As we explained in the *Access Charge Order* at paras. 30–33, high volume users may have the greatest incentive, under the present rate structure, to engage in bypass of the local exchange. If such users were to abandon the local exchange in this manner, the cost of inplace local exchange plant might have to be recovered from the remaining users, causing their rates to rise to levels which many low volume users might not be able to absorb. The rate structure we have developed in the access charge plan is designed to avoid that calamity and preserve the universal telephone service which we now enjoy. Thus, we expect that the rate structure we have developed in the access charge plan will further the goal of preserving universal service. We are aware of the fears of some parties that the flat end user charge may itself cause some residential subscribers to disconnect their telephone service. Although we do not expect this to occur, we nevertheless have adopted a number of safeguards that are designed to prevent any serious reduction in universal service. First, in order to ease the impact on residential subscribers, we have prescribed a gradual transition to fully cost-based end user charges. Second, during this transition, we intend closely to monitor the effect on universal service of the new access charge rate structure and to take whatever steps may be necessary to ameliorate any undue adverse impact upon universal service. See paras. 36–37 *infra; Access Charge Order* at paras. 195–96. We have already adopted a Notice of Proposed Rulemaking proposing the implementation of a monitoring plan, *Notice,* CC Docket No. 78–72, Phase IV, FCC 83–254, released June 8, 1983. Third, we will entertain petitions for lifeline waivers of the residential flat charges in order to preserve universal service, Paras. 12–14, *infra.* Finally, we have prescribed a Universal Service Fund to reduce the burden on ratepayers living in high cost areas. Para. 11, *infra.*

9. The Independent Alliance and the Michigan Public Service Commission assert that the Commission's reliance on bypass as a justification for

[11] See *Access Charge Order* at paras. 27–33 for a discussion of economic efficiency and bypass.

its decision is not supported by the record.[12] A number of technologies that allow bypass are already in place or will be in place within several years. Appendix F of the Access Charge Order cited numerous cases in which bypass technology is being considered or actually being implemented. Since bypassers are unlikely to return to the public network once they have gone to the expense of constructing bypass facilities, we found it imperative to act at once to limit uneconomic bypass. No evidence is presented on reconsideration to persuade us that this view was unduly pessimistic. The Independent Alliance also asserts that our decision ignores the fact that the interexchange carriers are responsible for the interstate costs.[13] That description of the situation merely obscures the nature of the problem. All costs of providing telecommunications services are ultimately borne by the users of telecommunications services. A change in the rate structure that replaces usage charges with fixed charges or vice-versa does not shift any burdens from carriers to users or users to carriers. The total carrier revenue requirement that all exchange carriers recover from all users will remain the same, but the relative burdens that are imposed upon particular users will inevitably change because different users have different usage patterns. The usage charges that are contained in MTS tariffs will, of course, be reduced in the tariffs that we have directed AT&T to file in October to comport with the reduction in the revenue requirement recovered through usage charges.

10. The decision that subscriber line costs should be recovered directly from the customer to whom the line is provided, although it is a significant change in rate structure, is consistent with the broad principles that have served as the foundation of Commission ratemaking decisions for the past quarter century. *See, American Telephone and Telegraph Company, Long Lines Department*, Docket No. 18128, 61 FCC 2d 587, 589, 609, 662 (1976), *Private Line Rate Case*, 34 FCC 217 (1963). Preeminent among these principles is the conclusion that "actual costs of providing service underlie the statutory requirement that rates be just, reasonable and nondiscriminatory." As a corollary to this principle, any ratemaking philosophy that results in disproportionate cost burdens among customers would generally violate this Commission's objectives and responsibilities. 61 FCC 2d at 662. Thus, one should not ask whether costs are caused by carriers or users. One should ask whether particular costs are caused by a particular user or class of users. The cost of a common line is attributable to the user who has that line, which is dedicated to his use and which remains available for his exclusive use in

[12] Petition for Partial Reconsideration filed by Independent Alliance ("Independent Alliance Petition") at 16; Comments of the State of Michigan and the Michigan Public Service Commission Supporting Reconsideration ("Michigan Comments") at 3, 6.

[13] Independent Alliance Petition at 13; Michigan Comments at 1.

sending or receiving any telecommunication that can be transmitted through the local dial switch. For this reason the imposition of a flat charge upon a subscriber who has a common line to recover some part of the fixed costs associated with that common line burdens that customer with no costs that the customer did not cause. Therefore, we will reject all petitions that seek the elimination of all flat charges for the interstate portion of the common line costs. Even if we wished to maintain a rate structure that is not cost causational we could not do so through usage charges without foreclosing the availability of alternative options for most persons who, under such a plan, might pay fixed costs that substantially exceed their own loop costs. Any such effort would probably be futile. It would not only be necessary to prohibit competitive alternatives that can be used to bypass telephone company local distribution facilities, but it would also be necessary to prohibit private line or other alternatives to the common line that telephone companies themselves provide. The increasing use of such alternatives during the past twenty years demonstrates that a substantial departure from cost-based pricing is not sustainable in the long run. We remain convinced that an orderly transition to a rate structure with minimal departures from cost-based pricing will serve the best interests of all consumers and the national economy.

11. We recognize that instances of undue hardship might occur if every user were required to bear the full costs of his particular line. The Universal Service Fund is designed to place a limit upon the flat charges that will be imposed upon subscribers in areas that have exceptionally high subscriber line costs. The Joint Board in Docket 80–286 has adopted a recommendation for ensuring that the end user charges in the highest cost areas will never exceed 200% of the nationwide average charges. We shall be considering that recommendation in the very near future and shall also reexamine the transition plan before the residential end user charge in any exchange exceeds $4.00. These safeguards, together with the possibility of lifeline waivers, should be ample to ensure that cost-based access charges do not subject any local exchange service subscribers to any undue hardship.

12. It is, of course, conceivable that a small minority of subscribers will not be able to afford a charge that does reflect average costs. The *Access Charge Order* stated that we would entertain petitions for lifeline waivers in order to accommodate such special hardship situations (paras. 136–37). Waiver requests must: (1) State the terms and conditions which apply to lifeline service; (2) specify the interstate access charge revenues which would be lost from lifeline subscribers; and (3) specify the adjustment to other interstate access charges which are under the petitioning party's purview necessary to secure the lost revenues. We

have not, as yet, received any such petitions for waiver and none of the petitions for reconsideration has presented any concrete proposal for a complete or partial exemption from initial or subsequent end user access charges that would be targeted at persons who might suffer any genuine hardship.

13. Although it would probably be impossible to reflect the effects of granting any such petitions that might be filed in the future in the tariff charges that will be filed in October, it should be possible to recover any lost revenue through other access charges. Therefore, our decision to reaffirm the transition to flat rate charges that will recover most common line costs should not be interpreted as foreclosing petitions for a partial or complete exemption for a clearly defined class of residential users.

14. Although the right to file a petition for waiver would normally be limited to the telephone companies whose tariffs are subject to the rule in question, because of the public policy implications of any such waiver we shall also permit state public utility commissions to file petitions to waive all or part of the residential end user charge for some category of residential subscribers. Alternatively, we expect that in many cases states can maintain low residential rates without resort to a waiver by creating local service "lifeline" rates that ameliorate the effects of the interstate access charge.[14]

2. *The End User Usage Charge*

15. The *Access Charge Order* established a transition plan for the recovery of the common line revenue requirement through a combination of end user flat charges, end user usage charges, and carrier's carrier charges that would be recovered indirectly from users through charges for interexchange services. We prescribed a five year transition period during which the carrier's carrier access charges would bear an annually declining share of the common line revenue requirement.

16. During this same period the telephone company would have some flexibility in structuring its end user charges. The *Access Charge Order* would, however, require that an end user pay a monthly minimum flat charge for each residential or party line of $2.00 and for each business line of $4.00, and that the business line flat charge never be more than 200% of the residential line flat charge. A carrier could also impose an additional usage charge for each originating conversation minute or call to recover the remainder of the costs assigned to the End User Common Line element. We did, however, impose a cap on the total monthly end user

[14] For example, if the state regulators determined that a limited class of subscribers should only pay $5.00 for telephone service, they could set their local telephone rate for a "lifeline" service at $3.00 in 1984, which, when combined with the $2.00 end user common line charge would yield a total charge of $5.00.

charge associated with each common line. Over the five year period that maximum monthly charge would decline annually by about 10%.

17. Traditionally collect calls and calls placed at the open-end of an Inward WATS (hereafter, "In WATS") line incurred no interstate charge for the caller. A caller in the "foreign exchange" also incurred no interstate charge for dialing the open end of an FX or CCSA line.[15] To preserve this arrangement in those areas in which the exchange carrier chooses to recover its end user common line costs through a mixture of flat and usage charges, the *Access Charge Order* required the carrier to recover some of its common line revenue requirement through a surcharge imposed upon interexchange carriers offering such "sent collect" services as a surrogate for usage charges imposed on "sent paid" calls. To achieve a similar result for calls billed to third party, the usage charge would be assessed on the third party's line.

18. The *Access Charge Order* also acknowledged that the interconnection arrangements provided to some interexchange carriers (*i.e.*, EN FIA–A) may hamper the local carrier's ability to detect interstate calls routed through these carriers' facilities. This would make it difficult for a local company to assign a usage charge to customers of such interexchange carriers for the End User Common Line element. In the *Access Charge Order* we recognized two possible solutions to the problem: another surrogate charge for EN FIA–A lines, or coordination of billing between the exchange carrier and the interexchange carrier with EN FIA–A interconnection. Concluding that the latter was more desirable, efficient and nondiscriminatory, we refrained from including a rule prescribing such an additional surrogate charge on EN FIA–A traffic.

19. A number of persons have filed petitions asking for reconsideration or clarification of issues relating to end user usage and associated surrogate charges. The first of these issues is the computation of usage charges when an end user relies on an OCC with EN FIA–A interconnection to the local network to make his interstate calls.[16]

20. In exchanges without local measured service, the EN FIA–A connections provided to OCCs do not allow the local company to identify the end user placing the call. The *Access Charge Order* recognized this problem but stated that OCC use of exchange carrier billing services would be likely to provide exchange carriers with sufficient information to develop an appropriate end user charge. The *Order* stated that in those cases in which such cooperation proved to be impossible, an exchange

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[15] The carrier was nonetheless compensated for some of its costs either through the division of revenue and settlements process (for In WATS) or through charges it imposed upon the FX or CCSA subscriber under its local business exchange service tariff.

[16] The term "OCC" is used in this Order to describe non-traditional interexchange carriers offering MTS/WATS equivalent services.

carrier could request waiver of the rules to allow development of OCC surrogates.

21. In their petitions for reconsideration, AT&T and other exchange carriers state that the billing information cannot be used to develop end user charges because neither the exchange carrier nor the interexchange carrier can attribute usage by EN FIA–A customers to particular lines. The OCCs that use EN FIA–A connections use personal identification numbers (or "PINS") for billing purposes and have no way of knowing the common line that was used to originate a particular call. The exchange carriers request that the Commission grant a general waiver of the access charge rules to allow surrogate charges on OCCs.[17]

22. The OCCs object to such a surrogate charge.[18] SBS states that the Commission should require OCCs to provide any needed subscriber information that they obtain through Automatic Number Identification ("ANI") but objects to any OCC surrogate charge. SPC believes that use of a surrogate charge is blatantly discriminatory and recommends that revenues associated with the end user usage charge be allocated to AT&T as an addition to the premium. USTS believes that OCC surrogate charges are unnecessary and unfair. U.S. Tel requests that the Commission explicitly prohibit use of an ENFIA surrogate. In its opposition filing, MCI urges that, if a surrogate is used, it should be collected on an equal per-minute basis from all carriers.[19]

23. We perceive the problem to be that, if end user usage charges are applied only to AT&T minutes and no surrogate is imposed for OCC minutes, AT&T would be placed at a competitive disadvantage and users of MTS and WATS would be subject to a discriminatory charge. The magnitude of this disadvantage would depend upon exchange carrier decisions rather than upon a public interest assessment of the opportunity cost of premium access. This outcome is contrary to the intent of the *Access Charge Order*. An OCC surrogate, however, would deprive users of OCC services of the benefit of the cap on end user usage charges,

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[17] *See, e.g.*, Petition for Reconsideration filed by AT&T ("AT&T Petition") at 36; Petition for Clarification of the GTE Telephone Companies ("GTE Petition") at 18; Opposition to Petitions for Reconsideration of United Telephone System, Inc. ("United Opposition") at 10.

[18] Petition for Reconsideration filed by SBS ("SBS Petition") at 39–40; Petition for Reconsideration filed by SPC ("SPC Petition") at 31; Petition for Reconsideration filed by USTS ("USTS Petition") at 2; Petition for Reconsideration of U.S. Telephone, Inc. ("U.S. Tel. Petition") at 15.

[19] Opposition to Petition for Reconsideration filed by MCI ("MCI Opposition) at 15. *See also,* Opposition and Supporting Comments filed by Ad Hoc ("Ad Hoc Opposition") at 19–20; Opposition to Petitions for Reconsideration filed by Western Union ("Western Union Opposition") at 11.

placing OCCs at a substantial disadvantage in the competition for heavy users' business.

24. Some petitioners have noted that AT&T credit card services present a similar problem because credit card calls are normally placed from a telephone that is not the customer's primary telephone. Moreover, businesses may obtain credit cards for some employees in order to enable them to place calls from their homes that will not be charged to their home telephone numbers.

25. Large users have also asked us to reconsider our rules imposing a surrogate charge on them for calls that originate at the open end of FX lines and InWATS service. Several carriers question the different treatment that the rules accord collect, credit card, and third number billed calls.[20]

26. In the *Access Charge Order* we explained that, if a local company chooses a rate structure for its end user charges that includes usage charges, a surrogate charge for the FX open end, 800 service, and collect calls becomes necessary in order to avoid conferring an unjust advantage on these potential substitutes for other interstate services. We viewed third party service as different in that with that service the billed party is typically the originating party.

27. The Ad Hoc Telecommunications Users Committee has suggested that we solve all of these problems by eliminating the end user usage charge and revising the transition plan to recover the common line costs through a combination of flat end user charges and carrier's carrier charges. If the end user usage charges did not exist, any surrogate charges that are substitutes for end user usage charges would be unnecessary.

28. Although the Ad Hoc Committee suggestion is more acceptable than the AT&T and OCC proposals, it is not a perfect solution because elimination of the end user usage charge would also eliminate the maximum charge or cap. We have viewed the maximum charge as an important part of the transition plan because it would eliminate the incentive to substitute private line services for MTS or WATS at the beginning of the transition. The alternative transition plan that the Ad Hoc Committee is proposing would solve that problem when the transition has been completed, but it would not produce the same immediate benefits. We did not adopt similar transition plans that were proposed by

[20] *See* AT&T Petition at 33–34; Petition for Reconsideration filed by Centel ("Centel Petition") at 7–8; GTE Petition at 12–13; Petition for Reconsideration of Rochester Telephone Corporation ("Rochester Petition") at 24–25; Petition for Reconsideration of United Telephone System, Inc. ("United Petition") at 9–10; Petition for Reconsideration filed by USITA ("USITA Petition") at 7. *See also* Comments of National Data Corporation ("National Data Comments") at 2–5.

GTE and others in *Fourth Supplemental Notice* comments for that reason.

29. However, we now conclude that transitional benefits that the end user maximum charge would produce are outweighed by the anticompetitive effects that inevitably result from any of the proposals that could make an end user charge workable. Elimination of the end user usage charge will also enable us to develop a simpler transition plan that will be easier to administer and that will be less confusing to customers and others. Therefore, we have decided to eliminate the end user usage charge and the associated cap or end user maximum charge. We are revising Subparts C and F of the access charge rules to describe a transition plan that will still achieve the end result of the original transition plan—recovery of subscriber line costs through flat charges on end users, except for costs covered by the Universal Service Fund and, possibly, lifeline waivers.[21]

30. The elimination of the end user usage and maximum charges would leave three different common line charges at the beginning of the transition—a flat end user charge, a premium access charge that is essentially a flat charge assessed to carriers that provide traditional MTS and WATS with superior interconnection arrangements, and a carrier charge that is assessed upon all interexchange services that use the common line. We have, however, decided to use a different mechanism to reflect premium value that is explained in Part III A. This will result in two common line elements—a flat end user charge and a carrier usage charge. The end user flat charges will be increased as the total carrier common line revenue requirement is reduced.

31. The original formula for transferring common line revenue requirements from the Carrier Common Line element to the End User Common Line element defined a residue that was computed by deducting the $4 per line end user revenue requirement and the revenue requirement attributable to the Universal Service Fund, customer premises equipment (or "CPE") and inside wiring costs from the total common line revenue requirement.

32. The original transition plan required that the total "residue" revenue requirement be shifted to end users by 1989, but delayed compulsory recovery of this requirement through flat charges alone until 1991. We are revising the transition plan to require achievement of both results by 1990; *i.e.*, the time schedules for shifting the entire residue to the End User Common Line element and for recovering the associated

[21] Under our permanent rules the only Common Line costs that will not be apportioned to the End User Common Line element will be the cost of funding the Universal Service Fund, the costs associated with inside wiring, and the costs associated with public pay telephones. *See* para. 58 *infra*, and Section 69.501.

revenue requirement through flat monthly charges to end users will be the same. We believe that this revision should substantially simplify the transition plan.

33. The removal of the end user usage charges also requires revision of the rules for determining the charges through which telephone companies will recover the Common Line access element's revenue requirement during the transition period. We have concluded that for 1984 the monthly end user charge for business users should be $6.00 per line,[22] while a residential end user's monthly flat charge for each common line should be $2.00. The remainder of the costs that under Section 69.104 (the rule prescribing the End User Common Line charges after the transition period) would also be recovered from subscribers shall be assigned to the Carrier Common Line and Special Access elements. In 1985 we shall require exchange carriers to maintain the monthly flat charge for each business line at $6.00 and to raise the monthly charge for each residential line to $3.00. In 1986 we shall require a one dollar increase in the per line charge for residential users while maintaining the business users' charge at $6.00 per line. We believe that our policy of protecting universal service fully justifies and, indeed, requires a more gradual transition to the new end user charge structure for residential users than is needed for business users and the concomitant disparity in monthly charges; this conclusion is reflected in the transition schedule we have prescribed.

34. In order to describe how charges for common lines are to be computed for 1987, 1988 and 1989, the remaining three years of the transition, we must first define what we mean by "transitional residue." For each of these remaining years the transitional residue will be the difference, if any, between the End User Common Line annual revenue requirement that would arise under our permanent access charge rules and the End User Common Line annual revenue requirement based on the 1986 end user charges.[23] In each of these years the transitional residue for that year will be apportioned between the End User Common Line element and the Carrier Common Line elements under the following schedule:

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[22] The business line end user charge may be somewhat less than $6.00 in many exchanges because the end user charge that would be computed under the post-transition rules establishes a ceiling on all end user charges during the transition. That ceiling is likely to be between $4.00 and $6.00 for many carriers.

[23] This amount would be the sum of the 1986 annual residential single line end user charge times the projected average number of residential single lines, the 1966 annual end user charge for each category of residential party line service times the projected average number of subscribers to that category of service, the 1966 annual end user charge for a business single line times the projected average number of single business lines and the 1966 annual end user charge for each category of business party line service times the projected average number of subscribers to that category of service.

Year	Percent of transitional residue assigned to carrier	Percent of transitional residue assigned to end user
1986	100	0
1987	75	25
1988	50	50
1989	25	75

The increasing monthly End User Common Line revenue requirement resulting from the increasing share of the transitional residue assigned to that access element will be apportioned among common lines on a *pro rata* basis and added to the 1986 monthly single-line end user charge for residential and business customers. If, however, a *pro rata* apportionment would produce a business line end user charge that would exceed the end user charge computed under the post-transition rules, an additional amount will be apportioned to residential lines in order to satisfy the requirement that no transitional business or residential end user charge exceeds the charge that would be computed under the post-transition rules.

35. This schedule provides less flexibility for carriers to design a transition to respond to threats of uneconomic bypass or reduction in universal service that might warrant a more or less rapid transition in particular places. We believe other devices, such as petitions for waiver or petitions to amend the rules, should be sufficient to enable us to depart from this schedule if unanticipated events warrant such a departure.

36. Paragraph 367 of the *Access Charge Order* said that we would conduct another notice and comment phase of this proceeding before the end of the fifth year of the transition in order to "evaluate nationwide and local effects of the transition before proceeding with the final steps in the transition plan." In view of the revisions we have made in the transition plan to reflect the elimination of the end user usage charge, that schedule must be accelerated. We shall conduct that notice and comment proceeding before the end of the third year of the transition.

37. The Joint Board has offered its assistance in monitoring the effects of access charges and related separations charges and we hereby accept that offer. We have also begun a rulemaking proceeding in this docket to develop procedures for obtaining comments and the data needed to assess the effects of access charges upon universal service. *See Notice of Proposed Rulemaking in MTS and WATS Market Structure,* CC Docket No. 78–72, Phase IV, FCC 83–254, released June 8, 1983. We anticipate relying heavily on the results of this rulemaking and the Joint Board's continuing vigilance to assure that our access charge plan is implemented in a manner that does not unduly impact universal service.

We have also instituted an inquiry to obtain more information with respect to the causes and magnitude of recent and prospective increases in local exchange service rates. *See Notice of Inquiry* issued in *Petition of the State of Michigan Concerning the Effects of Certain Federal Decisions on Local Telephone Service*, CC Docket No. 83–788, released August 1, 1983. We expect to have a preliminary analysis completed by December 1, 1983. If it appears that our access plan is having an untoward impact on local rates, we stand ready to make quick adjustments.

3. *Party-Line End User Rates*

38. Petitions for reconsideration or clarification have also raised some questions with respect to the lines that should be counted for purposes of imposing charges assessed on a per line basis. The rules that were adopted in the *Access Charge Order* did address the question of counting party lines. We adopted a transition rule that treats each party line customer as a separate line for purposes of assessing the minimum charge and a permanent rule the requires that the end user common line charge be computed by dividing the monthly single line end user charge by the number of users sharing such a line. Both REA and RTC assert that this permanent rule fails to reflect that an exchange carrier may have multiple grades of party-line service, that party-line subscribers cannot gain access to OCC facilities or receive certain other services available to single-line subscribers, and that party-line costs may in fact differ substantially from single-line costs. Fearing that the rule will create uneconomic incentives for choosing party-line over single-line service, they urge us to delete the rule and leave the development of party-line access charges to exchange carriers' discretion. AT&T proposes that the rule be modified to require computing a flat charge for each class of party-line service by dividing the single-line rate by the "fill" for the class of service.[24]

39. The party-line rule was intended to reflect the lower cost per user of access lines that are shared among two or more users. On reconsideration we find that the modification AT&T proposes would result in a more accurate allocation of these costs among party-line subscribers that still achieves the purpose of the original rule. For these reasons we shall make the suggested modification in the rule prescribing charges on party-line end users. We believe that this change should largely ameliorate the problems perceived by the Rural Telephone Coalition, the REA and the Michigan Public Service Commission. To the extent that party-line service

[24] By "fill" AT&T means the ratio of the projected annual number of subscribers to a given class of service (*e.g.* two-party or four-party service) to the annual projected number of lines physically used to provide that service.

is constructed by central office bridging, the larger number of lines would reduce the price differential between party-line and single-line service.

40. Michigan states that party-line service may in some cases actually cost more to provide than single-line service. We view this as an exception and not the rule. An exchange carrier would remain free to request that we waive our allocation rules in order to recover costs of central office equipment dedicated to party-line service from party-line rates. We believe that such waiver requests will be sufficiently rare, however, that there is no need to develop rules to separate the costs of party-line loops from single-line loops.

41. We are sympathetic to the Rural Telephone Coalition's concern that party-line service is an inferior grade of service that may deny many customers the benefits of more advanced communications services. Nevertheless, we believe that these customers will be able to decide whether the benefits to be gained from single-line service are worth the added costs. Interstate access charges that reflect costs will permit their choice of single or party-line service to be a rational one.

4. *Centrex-CO*

42. A number of petitions have also suggested that we clarify the status of lines that are used for Centrex-CO service for purposes of end user charges that are assessed upon a per line basis. Although Centrex services are not mentioned in the *Access Charge Order* or the rules that were adopted in that *Order*, it would be reasonable to infer that Centrex-CO lines would be counted in the same manner as any other line between a customer's premises and the local switch that may be used for local exchange service and a variety of interexchange services. Many petitioners have urged the adoption of a modification that would specify a different manner of counting Centrex-CO lines.[25]

43. Centrex-CO is a state-tariffed service now offered principally to large organizations and government agencies[26] as an alternative to their leasing or buying PBXs. With Centrex-CO, a part of the central office switch acts much like a PBX, providing a subscriber with such services as intercom, conference calling, direct inward dialing and automatically identified outward dialing. Centrex-CO requires a separate loop from the

[25] *See* petitions for reconsideration filed by Ad Hoc, AT&T, Delaware, District of Columbia, Pennsylvania, TCA, and UTCC, and comments supporting the AT&T petition filed by Illinois Bell, Pacific and Pennsylvania Bell.

[26] In the past six months the BOCs have begun to market the service to most subscribers, and in some jurisdictions, all subscribers, regardless of the number of stations a customer leases. *See* Comments Supplementing the Petition for Reconsideration filed by the Bell Operating Companies and the American Telephone and Telegraph Company filed by Pacific ("Pacific Comments") at 3–4; Comments in Support of Bell Petition for Reconsideration filed by Illinois Bell ("Illinois Bell Comments") at 3.

central office switch providing the service to each of the subscriber's stations. In a PBX system, these loops would be replaced by inside wiring terminating at the PBX, with the PBX linked by substantially fewer lines (or trunks) to the central office. The BOCs, several state commissions, and large end user trade associations assert that, because Centrex-CO competes with PBX systems, the loops used to provide this service should be subject to a lower interstate access charge than that prescribed for other business customer's common lines.[27]

44. AT&T, state commissions[28] and trade associations representing heavy users of Centrex-CO service[29] propose that a Centrex-CO customer pay a monthly common line access charge no greater than that which a customer with a PBX serving the same number of stations would pay.[30] They assert that levying a full common line access charge on each Centrex-CO line will almost surely lead to the demise of this service offering. They claim that this will produce several undesirable results including stranded investment, increases in local rates, and at least temporary dislocation, inconvenience and expense to present Centrex-CO customers.[31] They also state that treating each Centrex-CO line as a common line discriminates against Centrex-CO service in favor of equivalent PBXs and places Centrex-CO at an unfair competitive disadvantage.[32] PBX vendors join Western Union in asserting that it is the

[27] A Centrex-CO customer may have some "restricted" lines from which one can only reach another station if it is part of the same Centrex system. A share of the costs of even these "restricted" lines is, however, allocated to the interstate jurisdiction by separations procedures and must be recovered through interstate access charges levied on end users and, temporarily, on interexchange carriers.

[28] *See* petitions for reconsideration filed by Delaware, District of Columbia and Pennsylvania as well as comments filed by Michigan and Washington.

[29] *See* petitions for reconsiderations filed by Ad Hoc and TCA.

[30] AT&T proposes that this charge be determined by using the engineering tables upon which the telephone company relies in advising a customer with a PBX of the number of trunks required to provide stations behind the PBX with the same quality of service enjoyed by single line subscribers. AT&T Petition at 12–13. The district of Columbia would impose a flat charge for each Centrex line equal to 16% of the single business line rate. Petition for Reconsideration filed by District of Columbia ("District of Columbia Petition") at 5–6.

[31] The Reply Comments of Ad Hoc and TCA state that Centrex-CO lines should be treated differently from other lines because they are treated differently in the division of revenues procedures AT&T has developed for purposes of implementing the *Separations Manual*. Neither the present *Separations Manual* nor the revisions proposed by the Federal-State Joint Board in the exchange plant separations proceeding distinguish Centrex-CO lines from any other jointly used loop for purposes of apportioning investment to interstate services. The division of revenues of procedures cited in Reply Comments appear to relate to the weighting of exchanges for usage sampling purposes rather than the working loop count that is used to apportion investment in Outside Plant Category 1.3.

[32] *See, e.g.*, Pacific Comments at 3; District of Columbia Petition at 2.

AT&T proposal that would create unjust discrimination and false pricing signals.[33]

45. We cannot accept the argument that counting each Centrex-CO line as a line would create discrimination between Centrex and PBX users. If Centrex uses more lines, then Centrex necessarily creates more line costs. The suggestion that PBX users should pay more per line than Centrex-CO users because they get more usage from their lines appears to be a resurrection of the argument we rejected when we adopted the access charge plan. If we adopted usage as the criterion for assessing common line costs to PBX and Centrex-CO customers, we would be obliged to adopt usage as the criterion for assessing common line costs to all customers of telecommunications services.

46. It is also somewhat misleading to say that stranded investment would be created if Centrex-CO customers substitute PBXs. If PBXs are in fact more cost-efficient than the Centrex-CO service, that investment would not exist under optimal conditions.

47. Nevertheless, we cannot be certain that Centrex-CO does not have advantages that may offset the cost of additional lines. The customers cannot make choices that will promote economic efficiency unless both the interstate access charges and the Centrex-CO service rates that are tariffed with the state commissions are priced in a manner that reflects the appropriate costs. Some petitions and other comments, including comments of state commissions, claim or at least suggest that the rates for Centrex-CO service have been set at a level that exceeds intrastate costs attributable to Centrex-CO service in order to provide an additional subsidy for residential local exchange service. In these circumstances, the telephone companies would be deprived of a fair opportunity to compete and the customers and the economy as a whole would be deprived of any benefits that Centrex-CO service may be able to provide if we implemented our access charge plan in a manner that forced customers to abandon Centrex-CO service before the state commissions can reevaluate the rate structures they have adopted.

48. We have accordingly concluded that a multiyear transition for Centrex lines that are already in place or on order on July 27, 1983 is appropriate. For each year from 1984 until and including 1989, these "embedded" Centrex lines would be assessed a monthly per line end user charge equal to that assessed residential end users for that year.[34] Such a

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[33] *See* Petition for Clarification filed by UTCC ("UTCC Petition") at 7–11; Comments and Oppositions to Petitions for Reconsideration Regarding Centrex filed by NATA ("NATA Opposition") at 6–12; Opposition filed by Western Union ("Western Union Opposition") at 16–19.

[34] Although the use of PBX trunk equivalents might also provide a mechanism for phasing out the disparity between Centrex-CO users and other business customers, the use of such mechanism would create anomalies between Centrex-CO users and those paying for

temporary partial exemption will provide state commissions with additional time to reevaluate intrastate rates in light of our decision, will provide Centrex-CO customers with an adequate opportunity to make their choices in light of any decisions the state commissions may make, and will allow for additional recovery of Centrex investment from Centrex customers.

49. For purposes of determining the end user portion of the common line revenue requirement the residential rules should also be applied to the embedded Centrex lines. This would avoid imposing an additional burden upon other end users as a result of this temporary partial exemption for Centrex-CO lines. We believe it is appropriate to recover the shortfall that results from charging less than the ordinary business rate through the Carrier Common Line charges. This is consistent with our treatment of residential lines. Accordingly, we are revising Section 69.203 to establish procedures for counting Centrex-CO lines. Adjustments in intrastate rates that are either designed to preserve Centrex-CO service or to reflect a reapportionment of investment among remaining customers could have an adverse effect upon residential customers if state regulators choose to make upward adjustments in residential local exchange service rates. It should be possible to make any adjustments that might be required without affecting rates that residential customers pay. We shall, however, attempt to ascertain the magnitude of the problem and the likely response of state regulators as part of our monitoring effort and will consider alternative remedies such as separations changes if it appears that state regulators are unable to avoid adverse effects upon residential customers. We are asking the Docket 80–286 Joint Board to assist us in identifying the nature and magnitude of any stranded investment problem and we shall ask that Joint Board to develop recommended solutions that state commissions or this Commission could adopt to prevent an adverse effect upon residential local exchange service rates.

B. *Dedicated Access Line Element*

50. In the *Access Charge Order* we defined a dedicated access line to be either a WATS access line or a private line on the customer's side of an end office that does not terminate in certain types of customer premises equipment used exclusively for a particular interexchange service. This latter category could include all private lines, including closed end FX or

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residential lines. We do not think it appropriate that residential subscribers pay more per line for service than some Centrex-CO subscribers. The equivalency ratios that AT&T proposed would produce that result. In addition, the difficulty in arriving at appropriate PBX trunk equivalency ratios for different classes of customers makes the plan based upon residential service equivalency simpler to administer.

CCSA lines that terminate in a PBX, a key system or similar equipment. The *Order* required that a local company assess a monthly charge upon an end user leasing a dedicated access line that equaled one-twelfth of the average annual revenue requirement for all dedicated access lines in use. The revenue requirement associated with other private lines would be allocated to the Special Access element and recovered through charges assesses to interexchange carriers.

51. In their petitions AT&T, GTE and United ask the Commission to reconsider its definition of dedicated access lines. They note that in order to determine whether a customer has a dedicated access line or a special access line a telephone company must be able to identify the customer premises equipment to which it is attached.[35] Because telephone companies are no longer the exclusive suppliers of CPE at which a private line terminates, there is no reliable way of making this determination. They recommend that all private lines be reclassified as Special Access, leaving only WATS access lines in the Dedicated Access Line category. GTE and USITA also suggest that we amend our rules to permit interexchange carriers to place orders and receive the billing for dedicated access lines as well as special access lines.

52. Under our original access charge plan, the Dedicated Access Line charge was used to establish the maximum end user charge. On reconsideration we have eliminated the maximum end user charge. Therefore, the Dedicated Access Line element could not serve its primary function even if we could redefine that element in a manner that does not depend upon the CPE that is used in conjunction with the line. We have accordingly decided to eliminate the Dedicated Access Line element and to redefine Special Access primarily as a user element to include all private lines from the customer premises to the point of demarcation and all closed end WATS access lines.[36]

53. In their opposition filings, the Networks and Western Union expressed concern that the reassignment of voice grade private lines from the Dedicated Access Line to the Special Access category could result in assignment of costs to program transmission services and telex for which

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[35] For example, if the close-end of an FX line terminates in a PBX, the costs of the line would be allocated to the Dedicated Access Line element, with the end user being assessed the charge for the line. If the closed-end terminates in a handset, however, the costs of the line would be allocated to the Special Access element, with the interexchange carrier providing the FX service being assessed the charge for the line.

[36] We are also revising language in the apportionment rules to clarify the status of CCSA—ONALS and the private line portion of the open-end FX line. The original language might be misconstrued to describe those facilities as Dedicated Transport rather than Special Access.

those services are not responsible.[37] Admittedly the redefinition of the access elements could result in assignment of some CPE costs to services that do not use CPE that would be described as Popenoe Plan CPE. *See Amendment of Part 67* (Decision and Order), CC Docket No. 80–286, 89 FCC 2d 1, *as modified,* 90 FCC 2d 52 (1982). This would be purely a transitional problem because the CPE or CPE surrogate costs will disappear in four years. The prior definition would not have produced a perfect match of CPE costs and line charges in any event. Many end users who do choose to terminate a private line in a PBX may not have used a telephone company provided PBX for years. Therefore, it will not be possible to achieve much precision in assigning those costs to particular customers on a cost causational basis. We recognize this potential problem and we have drafted our Special Access rule provisions in such a manner as to permit the carriers to file appropriate tariffs which avoid charging the users of specialized private line service (e.g., program transmission, telex) for CPE costs which they have not occasioned.

54. The Dedicated Access Line element was described as an end user element in the *Access Charge Order* and the original Special Access element was described as a carrier element. We have received petitions requesting that interexchange carriers be permitted to order Dedicated Access lines and petitions requesting that end users be permitted to order Special Access line. As noted, we have reclassified Special Access primarily as a user element, para. 52 *supra.* We have decided that it would be appropriate to permit either an interexchange carrier or an end user to order any facility that is included in the combined element from an exchange carrier at the same rate, provided that the result is that any carrier which does so does not thereby avoid the payment of carrier's carrier charges as clarified in this decision. *See,* paras. 85 and 151–52 *infra.*[38] This should provide sufficient flexibility to meet the needs of customers with different needs. We shall, however, continue to classify Special Access as a "traffic sensitive" element for purposes of an election to join or refrain from joining in association charges for traffic sensitive elements.

C. *Pay Telephone*

55. In the *Access Charge Order* we established an access element explicitly to recover the nontraffic sensitive ("NTS") costs associated with pay telephones. Concluding that it would be impossible to recover such

[37] Response of American Broadcasting Companies, Inc., CBS Inc. and National Broadcasting Company, Inc. to Petitions for Reconsideration and Clarification ("Networks Opposition") at 1-2 and Western Union Opposition at 13.

[38] Accordingly, interexchange carriers must allow customers who decide to order Special Access lines directly from the exchange carriers to connect such lines to their interexchange networks.

costs through flat rates, we proposed to recover them through usage charges imposed on end users making interstate or international calls from a pay telephone. *See* 47 CFR 69.103. Those placing collect, credit or third number billing calls from pay phones, however, would not be assessed this usage charge.

56. In their petitions for reconsideration, several parties have questioned the fairness of this rate structure. Each notes that many, if not most, interstate calls from pay telephones are not "sent paid."[39] As a consequence, under the present rules only a fraction of those using pay telephones would pay for this equipment. While all agree that this result would be inequitable, they propose three very different solutions to cure the problem. Centel, GTE, United and USITA would recover the costs from all interexchange carriers based on relative use. AT&T would recover the costs only from those interexchange carriers whose services can be accessed from pay telephones. Rochester proposes to distinguish between semipublic[40] and public[41] pay phones. The costs of the former it would recover through a flat charge that would be assessed to the subscriber on whose property the telephone was located. Rochester would recover "a substantial portion" of the NTS costs associated with public pay phones from all subscribers through the flat end user access charge for common lines. Discount Phone urges us to require that pay phone costs be recovered from all persons using these phones to originate interstate calls. It proposes that this be done either by having each interexchange carrier act as the local companies' billing and collection agent for charges that recover these costs or by requiring each user to deposit coins to cover an end user pay phone charge, even if that user is placing a credit card or collect call.

57. We agree with the parties that the access charge plan for recovering pay telephone costs should be modified. Each alternative they have proposed, however, has disadvantages as well as the advantages its proponents emphasize. The telephone companies' proposal would be straightforward to administer and would provide assurance that they will be able to recover their investment in these facilities. As the OCCs and Discount Phone note, however, this rate structure will not assure that it is the cost causative customer who ultimately pays the charges. In fact, the

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[39] *See, e.g.*, AT&T at p. 37; Centel Petition at p. 5; GTE Petition at p. 11.

[40] A pay telephone is used to provide semipublic telephone service when there is a combination of general public and specific customer need for the service, such as at a gasoline station or pizza parlor. The BOCs provide directory listing with this service. *See* Engineering and Operations in the Bell System (Bell Engineering) at 684.

[41] A pay telephone is used to provide public telephone service when a public need exists, such as at an airport lobby, at the option of the telephone company and with the agreement of the owner of the property on which the phone is placed. *See* Bell Engineering at 680.

OCCs fear that they will be charged for facilities that can be used only for AT&T interexchange services, either because a pay phone is a rotary phone or because it is a "Charge-a-call" phone that accesses only AT&T facilities. On the other hand, the first Discount Phone proposal would be impossible to implement. The local companies' measurement problems that are associated with ENFIA interconnections extend to calls placed from pay phones. The interexchange carriers with such connections rely on personal identification numbers and the location at which a call enters and leaves their network to determine subscriber charges. In these cases there is no way to capture pay phone usage. The Rochester proposal to recapture the costs of public pay phones has the unhappy effect of raising end user flat charges above associated costs.

58. After weighing the relative advantages and disadvantages of each proposal we have concluded that the best solution to the dilemma is to eliminate the rate element for coin telephones which can access the services of multiple interexchange carriers, and to reassign the costs associated with coin telephones to the common line revenue requirement. The ideal solution would be to recover the nontraffic sensitive costs of public pay phones also from end users who rely upon pay phones to originate their interstate calls. We are convinced, however, that at this time this ideal cannot be achieved. We believe a second best solution is to apportion these costs among the interexchange carriers upon whose services these customers rely to make their interstate calls. Consequently, the remainder of the additional revenue requirement associated with public coin telephones will be allocated to the Carrier Common Line Element and recovered through the usage sensitive charges assessed all interexchange carriers originating and terminating services in that study area. This is not a transitional assignment. Such costs will be treated in the same manner as inside wiring and Universal Service Fund costs that are assigned to the carrier portion of the common line revenue requirement.

59. Several OCCs oppose AT&T and GTE proposals to allocate pay telephone costs among interexchange carriers on the basis of relative total traffic in the area covered by each tariff. They question whether the percentage of OCC traffic originating at pay stations is as great as that originating from other uses. These OCCs state that pay phones offer inferior access. We nevertheless accept the telephone company proposals. The substitute for the premium access charge will account for the inability of telephone companies to pass on dial pulse signaling and other inequalities. Costs of alternative proposals to measure pay telephone usage directly appear excessive. Thus, while the telephone company proposal may be imperfect, it appears superior to the proposed alternatives.

60. We are, however, accepting the suggestion that loop costs associated with semi-public telephones be recovered from subscribers to that service in the same manner that costs associated with an ordinary business subscriber line are recovered. Those fixed costs can be recovered from an identifiable business end user through flat charges.

61. We are also creating a new element to recover costs associated with a third type of public telephone that was not discussed in the *Access Charge Order.* In recent years telephone companies have installed a number of coinless public telephones that may be used to place "sent paid" or "sent collect" interexchange calls without needing any coins at all. The AT&T reorganization plan has been modified to assign the telephones as well as the lines to the divested BOCs.[42] If the loops and the terminal equipment of these new telephones or of traditional pay telephones, are dedicated to interexchange services of a particular interexchange carrier,[43] these costs should be recovered through a flat carrier's carrier charge that is assessed to the interexchange carrier that ordered the particular telephone. We are accordingly creating an additional carrier's carrier access element which we shall call the Limited Pay Telephone element. On the other hand, if a coinless public telephone may be used to place interexchange calls on several interexchange carriers, the costs of the loops and terminal equipment should be treated like those of public coin telephones—allotted to the Carrier Common Line Element and recovered through usage charges assessed all interexchange carriers originating and terminating services in that study area.

62. Although this access service is presently used primarily for the Charge-a-Call service offered by AT&T, other interexchange carriers may wish to offer similar services to their customers. The exchange carriers will be required to offer Coinless Pay Telephone facilities to any interexchange carrier who wishes to obtain that kind of access service if they offer such facilities to any interexchange carrier.

III. *The "Carrier" Access Elements*

63. The *Access Charge Order* established a number of elements that will be assessed to interexchange carriers and recovered indirectly from end users through the interexchange service rates in tariffs that will be filed by the interexchange carriers. The first group of carrier charges is designed to recover the carrier portion of the common line revenue requirement. The second group is designed to recover the cost of end

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[42] *See* Opinion issued in United States v. American Telephone and Telegraph Co., Civil Action No. 82-0192 (D.D.C., filed July 8, 1983) at n. 195.

[43] We reach no conclusion as to whether the BOCs may, or may not, under the MFJ offer coin or coinless public telephones which are capable of accessing the services of only one interexchange carrier. We treat this Limited Pay Telephone category generally because other carriers appear free to offer this type of service.

office services that are provided for services that are switched at one or both ends in manual or dial switching facilities that are also used for local exchange service. The third group is designed to recover additional switching and trunking costs associated with the transmission of such switched services from an end office to an interexchange facility. The fourth group is composed of some additional access services such as the provision of billing and collection and local distribution for special services. For convenience, we will describe the first group as common line charges, the second group as end office charges, the third group as transport charges, and the fourth group as other charges.

A. *Common Line Charges*

1. *The Usage Charge*

64. The *Access Charge Order* established two carrier common line charges—a transitional flat charge for premium access that would be recovered from the interexchange carriers that provide MTS and WATS and a usage charge that would be recovered from all interexchange carriers that provide services that use local exchange switches. The major purposes of this carrier usage charge were to provide a permanent mechanism for funding the Universal Service Fund and to ease the transition to recovery from end users of all the costs of dedicated facilities not met by contributions to that fund. In 1984, these Common Line elements would have been used for recovery of over half of common line costs. During later years this proportion would decline. Carrier Common Line charges were to be assessed on interexchange carriers by the exchange carrier association. Because a single nationwide rate for the usage charges is to be assessed, significant averaging will occur during the initial transition, allowing time for the Universal Service Fund to be implemented.

65. Several petitioners seek modification of certain aspects of the carrier usage charge, or even complete elimination of this charge. SBS argues that the charge is inefficient since it is not cost-based.[44] MCI claims that such a charge would cause disruption that will not promote a smooth transition.[45] SPC states that the charge embodies an artificial distinction between common lines and dedicated lines. This distinction, SPC believes, will artificially favor AT&T.[46] ADCU says that the rules do not state whether the reduction in carrier common line charges is to be based on the original base or is to be adjusted to reflect changes in costs.[47]

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[44] SBS Petition at 41–43.

[45] Petition for Reconsideration filed by MCI ("MCI Petition") at 19–20.

[46] SPC Petition at 10, 34.

[47] Petition for Reconsideration and/or Clarification of the Association of Data Communications Users ("ADCU Petition") at 4–5.

Finally, in its reply to oppositions the AT&T interexchange entity, "ATTIX," states that the carrier common line charge could not be used to recover the entire Universal Service Fund without generating bypass concern. ATTIX recommends that USF revenues in excess of $1 billion be recovered through national end user charge surcharges.[48] USTS has recommended that all Universal Service Fund costs be recovered through a per line surcharge on end users.

66. ATTIX and SBS are legitimately concerned about the possible uneconomic effects of the Carrier Common Line charge. Such charges do reduce the relationship between rates and cost causation. Nevertheless, as the *Access Charge Order* stresses, for the most part the Carrier Common Line charge is a transitional charge. We explicitly recognized the economic costs of such a charge but viewed these costs as acceptable consequences of a gradual and certain transition. None of the petitions were able to suggest any alternative mechanism to produce such a transition.[49] We, therefore, reject any suggestion that the carrier usage or Carrier Common Line charge be abandoned.

67. We have also decided that we should not adopt the USTS or the ATTIX proposals for reassigning some or all of the Universal Service Fund costs. Assuming that we adopt the Joint Board's recommendation to begin phasing in high cost factor apportionments in 1986, there will not be any identifiable Universal Service Fund for at least two years.[50] We will deny those petitions without foreclosing further consideration at a more appropriate time.

68. We should note, however, that a substantial question has been raised with respect to ATTIX's right to present any proposals in its own name. SBS has file motions to strike all or part of the ATTIX filings in this proceeding because the combined AT&T and ATTIX filings exceed the applicable page limitations. SBS notes that ATTIX is not even a subsidiary corporation, it is merely an organizational division within the parent company. SBS alleges that the separate filings on behalf of the parent company and a division of the parent company represent an evasion of the rules and orders establishing the page limitations for this proceeding.

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[48] Supplemental Reply on Behalf of the American Telephone and Telegraph Company Interexchange Operations ("ATTIX Reply") at 8–12.

[49] In response to the ADCU Petition, it is our intent that the Carrier Common Line charge depend on projected costs for particular transition year. This tends to smooth the transition. We believe the rules do describe that intent with sufficient clarity.

[50] The absence of an identifiable high cost factor in 1984 and 1985 would not prejudice end users under the transition plan we have adopted. The high cost factor will have no meaningful impact upon the computation of end user access charges until the second phase of the transition. Under this plan high cost companies during the first two years would receive the necessary relief through the Access plan's transitional NTS Revenue Requirement support from Common Carrier Line charge.

69. In view of the possible ambiguity in our rules with respect to the filing of comments by elements of the current integrated Bell System, we have concluded that the public interest would not be served by striking these particular filings from the record in this docket. We have also concluded that we should not accept separate ATTIX filings in Commission proceedings in the future. Requiring the parent company to speak with one voice in our proceedings should produce more orderly proceedings. The selection of that voice is, of course, the prerogative of the AT&T management. If the AT&T management wishes to assign responsibility to the ATTIX organization for the preparation of some or all comments or other documents that will be filed on behalf of AT&T, it may do so.[51]

2. *The Usage Measurement.*

70. Section 69.105 of the access charge rules describes the computation and assessment of the Carrier Common Line usage charges. That rule states that "conversation minutes" of "use of any local exchange switch" are to be used for that purpose.

71. The AT&T petition notes two problems with that rule. First, usage of the local exchange switch includes switching at the closed end of a WATS service that does not use a common line. Second, the term "conversation minute" is not defined.

72. AT&T has proposed an amendment to Section 69.105 that would expressly exclude closed end WATS usage of the local switch from the usage that is counted in order to compute and assess the Carrier Common Line usage charges. We have decided to adopt that proposal in order to make the rule conform with our actual intent. Common Line usage charges obviously should reflect common line usage and should not include usage of WATS access lines.

73. AT&T and Centel have suggested a definition of "conversation minutes" that could be used for the Carrier Common Line usage charge and other access charges that are computed and assessed on the basis of "conversation minutes." They would ascribe two different meanings to the term depending on whether the minutes are being measured at the originating or the terminating end of the call. Only in the latter case would they apply the usual meaning to the term "conversation minute," i.e., the usage arising from the time the end user at the terminating end picks up the telephone until a party disconnects. For carrier's carrier charges, they would propose that chargeable usage begin on the originating end as soon as the interexchange carrier's facility at the

[51] This decision should not be interpreted as foreclosing Bell Operating Companies including Cincinnati Bell and Southern New England Telephone Company from joining an AT&T filing and filing separate supplemental comments of their own.

originating end of the call acknowledges receipt of the transmission.[52] The OCCs recommend that we replace "conversation minutes" with "billed minutes" as the basis for assessing carrier's carrier charges.[53]

74. Both proposals have positive and negative facets. The telephone companies' proposal would base charges on data that the exchange carriers themselves can collect and verify. Because the measure they propose is similar to holding time minutes, it also ties charges more closely to cost causation. Its principal drawback, as the OCCs emphasize, is that it would increase the costs of access for OCCs with no concomitant improvement in the quality of access services they receive. *See, e.g.*, USTS Reply at 12–16. The increases would, in fact, be directly attributable to the inferior interconnection that these carriers now receive. *See id.* The use of "billed minutes" would avoid increased charges to OCCs arising because of their inferior interconnection to the originating exchange network. We have found the meaning of that term, however, to be the subject of seemingly endless dispute under the ENFIA tariffs. *See, e.g., American Telephone and Telegraph Company,* 91 FCC 2d 1079 (1982), *on reconsideration,* FCC 2d (FCC 83–125, April 25, 1983), *affirmed in part, remanded on other grounds sub nom. MCI v. FCC,* ___ F.2d ___ (D.C. Cir. 1983). For this reason we believe that as a basis for assessing usage charges on interexchange carriers, "billed minutes" would be undesirable. We conclude that on balance the telephone companies' proposal offers the better long term solution. Accordingly, we shall require that the Carrier Common Line charge assessed on each interexchange carrier be based on a measure of usage that we call "access minutes."[54] On the originating end of an interstate call, access minutes of use charged to an interexchange carrier shall begin when the originating end user's call is acknowledged as received by the interexchange carrier's facility in that exchange area. On the terminating end of an interstate call, access minutes of use charged to the interexchange carrier shall begin when the call is received by the called end user and thus completed end-to-end. At each end, access minutes will terminate when the calling or called party hangs up, whichever event is first recognized by the exchange facilities at that end.

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[52] *See* AT&T Petition at 24–25; Centel Petition at 11–12.

[53] *See* MCI Petition at 17–21; USTS Petition, Attachment 3 at 26–30; Opposition filed by SBS ("SBS Opposition") at 4–5; SPC Opposition at 4–5; Western Union Opposition at 7–9.

[54] We have used the term "access minute" for this unit of measure because we find the use of the term "conversation minute" to be a confusing misnomer for the kind of usage on which interexchange carrier's monthly Carrier Common Line charge will be based. We are also amending the rules for computing the charges associated with the Line Termination, Local Switching and Intercept access elements to require that these charges too be based on access minutes.

75. Section 69.2(a) of the access charge rules presently defines "access service" to include the origination or termination of any interstate or foreign telecommunication that is subject to or exempt from tariff regulation. Several petitioners have asked us to clarify the application of particular carrier charges to resellers, enhanced service providers and other users of access service.

76. Inasmuch as most of our rules that describe the assessment of particular elements, including the Carrier Common Line usage charge, speak of charges that are assessed upon "interexchange carriers", there is some uncertainty as to whether these rules would apply to entities which may not be considered carriers, such as enhanced service providers and operators of sharing networks, but which also use access service. Our intent was to apply these carrier's carrier charges to interexchange carriers, and to all resellers and enhanced service providers other than those, such as hotels, who provide their communications service solely at their own premises, or where the service is intended for internal administrative purposes.

77. We agree that our rules require clarification in this regard. In the course of sorting through and attempting to classify all of the entities that use access service, and taking into account some of the identification and measurement difficulties involved, it has become apparent to us that several important modifications to the charging scheme are needed if the Commission is ultimately to achieve its objective of distributing the costs of exchange access in a fair and reasonable manner among all users of access service, irrespective of their designation as carrier or private customer. We shall now describe these modifications and explain why we believe the revised plan offers the soundest means of distributing the cost burden. We outline below procedures to be used in the near term that are designed to achieve a rough equity among access service users, but which reflect a number of constraints on achieving greater uniformity immediately, including concern over customer impact. We also set in motion a program that we hope can hasten the time when, as operational problems are overcome and innovative ratemaking procedures can be introduced, all exchange access users will be charged on the same basis.

78. Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, large and small, who "leak" traffic into the exchange. In each case the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area. At its own location the user connects the local exchange call to another service or facility over which the call is carried

out of state. These may consist either of owned or leased transmission capacity or a specific message service such as WATS. Depending upon the nature of its operation, a given private line or WATS user may or may not make significant use of local exchange service for interstate access. Thus, in the case in which a user connects an interstate private line to a PBX, some traffic may originate and terminate at the user location and other traffic may "leak"[55] into the exchange in order that the calls can be completed at another location. A facilities-based carrier, reseller or enhanced service provider might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities to access its customers. Hereafter we shall use the term "leaky PBX" to denote the generic problem just described, whether the "leak" occurs through a PBX or through another mechanism or instrumentality.

79. Of the many entities that now use access service, some are currently paying relatively high carrier usage charges, through either the settlements/division of revenues process or ENFIA rates, while others are obtaining exchange access at ordinary business local exchange service rates, which can be quite low in comparison, particularly in areas which have not implemented local measured service.

80. Leaky PBX traffic is far more significant in amount than the name would suggest. Large private systems, including CCSA and EPSCS-type networks and tandem-dial private systems originate and terminate vast quantities of interstate and intrastate toll traffic through the use of exchange telephone service paid for at local state rates. We had originally observed in the *Access Charge Order*[56] that leaky PBX traffic would diminish as increasing flat end user charges reduced the incentive to substitute private line for MTS. Now that the movement toward maximum end user flat charges will be somewhat more gradual, we must reevaluate our earlier conclusion that we need not levy specific additional charges on private line customers. Inasmuch as Carrier Common Line charges will be higher than anticipated as a result of the slowed transition to end user charges, failure on our part to include leaky PBX users in the access charge plan might actually prompt customers to rely even more on leaky PBX configurations to avoid message service rates which incorporate full access costs. Since our intention in this proceeding is to have all interstate users of exchange access pay the same charge for the same service, we must develop a strategy to address the leaky PBX situation commensurate with this goal. As we explain below, we have developed a transition plan to ensure that those responsible for leaky PBX traffic bear

[55] The leaky PBX phenomenon was described in the Second Supplemental Notice. 77 FCC 2d 224.241.

[56] *Id.* at para. 127.

some share of interstate access costs. We recognize that private lines have proved beneficial to many users, and our plan is not meant to discourage or limit those uses. Our purpose here is only to ensure that those private line users who do access local exchanges contribute a fair share to the support of those exchanges.

81. To place the leaky PBX problem into a rate perspective, it is important to understand why the incentive to use private line/exchange service networks in lieu of direct interstate access via MTS, WATS or OCC message services remains strong. The current access charge plan is geared primarily toward carrier providers of MTS/WATS equivalents, i.e., those paying ENFIA rates, and the telephone companies which pay through the separations procedures for their joint use of local telephone company plant. If no change were made in the plan, these groups would incur almost all of the non-user-assigned costs associated with interstate use of local exchange service. A large privately owned or leased system, on the other hand, using an array of services including switched private line and local exchange telephone lines would pay only local telephone rates. In many cases, that local rate is flat, regardless of the amount of use on the line to satisfy its interstate calling needs. There, it could be argued that no charge whatsoever is assessed for interstate use of local services since the flat rate comprehends local service only. In cases where the local rate is metered, notably in urban business areas, an incremental charge is for additional usage on the local exchange line so that some payment is made towards defraying the costs of operating the local exchange network.[57] This charge, however, is not applied to recovery of the interstate revenue requirement where the local exchange is used to originate or terminate interstate calls. In searching for a way to include leaky PBX use in the access charge plan, we are mindful that it will be difficult to devise a plan which specifically identifies interstate use of local exchange service and charges for such use on a discrete basis. We are not aware, for example, of any current practical means whereby interstate traffic can be distinguished from local or intrastate traffic on a private line. In many cases for example, the interstate private line extends between points in the same state making it very likely that some indeterminate amount of solely intrastate traffic on such line is jurisdictionally interstate.[58] Even if this could be done, however, each private line

[57] Under the current ENFIA tariff arrangements such payments are credited back to the customers.

[58] However, where two PBXs in the same state are tied together by private lines, in almost all cases such private lines are jurisdictionally interstate since the potential exists to handle interstate communications on such lines by switching to WATS, MTS, private lines or other transmission services which extend to out-of-state points. People of the State of California v. FCC, 567 F.2d 84 (D.C.Cir. 1977), *cert. denied* 434 U.S. 1010 (2978). Since the nature of the communications determines jurisdiction, Ward v. Northern Ohio

would have to be metered,[59] and some determination would have to be made of what percentage of local exchange traffic was interstate in order to avoid double charging, i.e., payment of a local metered charge plus an interstate per minute access charge. Clearly, if lines are not metered, there is no way to determine what percentage of traffic over exchange lines is interstate or local. Because of the increasing convergence of interstate and intrastate network and the ensuing difficulty of separating interstate communications from local and other intrastate communications, it would be most difficult in the long run to maintain a dichotomy between exchange service charges for interstate and for intrastate use. Until such time, therefore, as the leaky PBX problem can be resolved through ratemaking or facilities changes in private line, local exchange, or both, or by such other reasonably non-discriminatory means as the exchange carriers may devise, we find that a reasonable means of addressing the existing discrimination is to develop a surcharge on private lines to assure some contribution from all leaky PBX users. This charge is intended to be a surrogate for the carrier common line charges or similar charges we would otherwise impose.

82. We have decided, therefore, to require the imposition of surcharges on all jurisdictionally interstate private lines provided by exchange carriers. In the interest of consistency with our access charge scheme, we will include the closed end of WATS among the lines to which the surcharge should be assessed. This will also serve to reflect, in a representative and fair way, the fact that WATS, as a service which offers bulk calling capability at a declining usage rate, creates incentives among large users, resellers, enhanced service providers and sharers to access WATS from remote locations over local exchange or private lines. This latter arrangement is commonly found in large switched private line networks, such as the one used by the airlines for reservation and other services. At present, however, it would not be worthwhile to access MTS[60]

Telephone Company, 300 F.2d 816 (6th Cir. 1962), it would be most difficult to show that any switched private line within a state is not jurisdictionally interstate since it is not practical to separate the interstate from the intrastate traffic. It should also be pointed out that a private line which extends between points in different states can carry jurisdictionally intrastate communications. See Section 3(e) of the Act.

[59] Private line service is a leased channel dedicated service. It can be distinguished from message, common access, or allocated service, e.g., MTS, principally by the fact that it is not currently metered or measured as a matter of course. See, for example, Private Line Rate Structure and Volume Discount Practices, Notice of Inquiry and Proposed Rulemaking (Docket No. 79-246), 74 FCC 2d 226, at 231 (1979).

[60] There are of course occasions where a telephone subscriber will call a business office location to obtain MTS access, commonly through conferencing arrangements on telephone or key telephone handsets. This is done, however, principally to transfer the expense of the MTS call to a business rather than residential account, and not to achieve a lower rate for the call.

from remote locations via local exchange service since the user can originate a call at the user's premises at the same rate without incurring any local exchange charges.

83. Before determining the level at which the surrogate surcharge should be set, we will determine under what circumstances the surcharge should be applied. At present, resellers and other carriers pay carrier-type access charges in the form of ENFIA rates when they resell private line service in their provision of MTS/WATS-type services. We believe that it is reasonable similarly to require that carrier access charges be applied to any private line reseller to which ENFIA would have applied. Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. One of our paramount concerns in fashioning a transition plan is the customer impact or market displacement that any proposed remedy might cause. Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability. The case for a transition to avoid this rate shock is made more compelling by our recognition that it will take time to develop a comprehensive plan for detecting all such usage and imposing charges in an evenhanded manner. We would envision that once a procedure is implemented by which the exchange carriers charge all access service users for their usage on an equal basis, the level of carrier access charges in general should fall as the universe of liable entities is expanded. For this reason also, it would be unreasonable immediately to increase as much as tenfold the charges paid by customers who do not presently come under the coverage of the current ENFIA tariff. In contrast, those carriers which are presently subject to carrier-type charges under the ENFIA tariff have already experienced the transition to ENFIA-type charges and have had time to adjust their operations.

84. Our decision to continue to apply carrier access charges to private line resellers, however, does not mean that we are oblivious to the difficulties that might be encountered in attempting to identify resellers for purposes of imposing charges which are not paid by the general public. For one, resellers are no longer required to file tariffs with this Commission. *Competitive Carrier Rulemaking* (Second Report and Order), 91 FCC 2d 59 (1982), recon. FCC 83–69 (released March 1, 1983). Further, the line between resellers and sharers has always been difficult to administer, as is evident from a reading of our *Private Line Resale*

and Shared Use decision in which these terms were defined, and will be made even more difficult as a result of new technologies and modes of operation, regulatory developments, and different rate incentives.[61] In addition, there are other factors that might make it very difficult to distinguish resellers from enhanced service providers and private systems. A reseller, for example, could attempt to change over to an enhanced form of operation or disguise itself as a private user by simply not advertising, or by integrating its network with that of a very large single-company network. In any event we emphasize that efforts made by exchange carriers to identify resellers must be of a reasonably consistent and nondiscriminatory nature.[62] To the extent that certain resellers cannot be identified, as may be the case, the surcharge which applies to all private line users will apply to them as well, and will similarly serve as a temporary surrogate for interstate access charges. We do not intend for carrier's potential failure to identify resellers through reasonable means to become grounds on which either exchange or interexchange carriers can justify reasonable terms or conditions in their tariffs, or can otherwise restrict beneficial uses of service, in the interest of controlling resale activities.

85. The transitional considerations do apply, however, to resellers and other OCCs to the extent they resell WATS. ENFIA charges do no apply to WATS resale. Rather, WATS resellers pay for their own associated local exchange service on the basis of rates filed in the state tariffs. Therefore, those carriers using resold WATS in conjunction with local exchange service as some part of their operations would experience a severe rate impact were they required to pay full carrier usage charges at the outset. Here, too, we think the better course is to assess the surcharge upon all WATS special access lines during 1984.[63] As provided in paras. 88

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[61] Docket No. 20097, Resale and Shared Use, 60 FCC 2d 261 (1976) *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). Here, the key line drawn between resellers and sharers involved the need to determine whether a profit motive exists. The profit, moreover, must derive from the resale of the underlying carrier's service, and not from other service features or functions added to these services. Also, it is possible that a manager of a sharing group could be a profit-making entity. Up to now resellers have had an incentive to retain common carrier status in order to avail themselves of services which are not available to the general public (See, for example, the 19 Bell System Operating Companies' Facilities for Other Common Carriers tariffs filed with this Commission). Once that incentive is changed, the resellers might attempt to alter the nature of its operation or do whatever it could to avoid interstate access charges.

[62] For example, a consistent set of criteria for identifying resellers could be used, so long as these criteria did not become a vehicle for expanding the definition of resale or including other classifications of users.

[63] Consistent with the scope of the ENFIA tariff, we are limiting initial application of carrier access charges to situations in which private lines are resold to form OCC MTS-

and 90. *infra.* we will reassess the appropriate level of the surcharge for WATS lines and for all other private lines after 1984, and if necessary we will make appropriate adjustments.

86. Having determined which entities will be required to pay a surcharge, we now determine the appropriate level at which the surcharge should be set. Ideally, the surrogate private line WATS surcharge should be set at a level which yields overall revenues representative of the revenues forgone on account of users obtaining access services at local telephone service rates. In other words, the aggregate surcharge revenues serve as a surrogate for the interstate access charges which would be collected if leaky PBX usage could be quantified and identified as to source. However, in order to protect those private line customers with relatively low leaky PBX usage, we will be conservative in our estimate of these forgone revenues. For the plan to work, we are requiring that the surcharge be applied to all interstate WATS lines without exception and to all private lines[64] except those which are used by carriers in MTS/WATS-like configuration where carrier's carrier access charges will already

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EATS-type services. Resellers or facility-based OCCs who also resold MTS, WATS or OCC MTS-WATS-type services should be charged business local exchange service rates rather than carrier access charges, since ENFIA by its terms does not apply to the resale of MTS and WATS provided by AT&T, nor to resold OCC MTS or WATS-type services. *See AT&T- Applicability of ENFIA to Certain OCC Services,* 91 FCC 2nd 568, 575–77 (1982), *appeal pending sub nom. U.S. Telephone Communication, Inc. v. FCC.* No. 82–2324 (D.C. Cir.) This treatment will avoid any duplication of charges or unreasonable discrimination which might otherwise have resulted. However, resellers of OCC WATS-type service will pay a private line surcharge since a dedicated line to the OCC premises is generally required. In circumstances where carrier's carrier charges apply, such dedicated lines are to be furnished as Dedicated Transport Facilities in circumstances where carrier's carrier charges will not apply the dedicated facilities are to be furnished as private lines or WATS OPS to which a surcharge is applicable. For purposes of delineating the applicability of local business rates as opposed to carrier access charges, we will rely generally on the terms of the current ENFIA tariff as interpreted by Commission decisions. We shall address any controversies that may arise in this regard on a case-by-case basis.

[64] By private lines we mean dedicated transmission services including nominal 4 kHz voice grade lines; digital voice capacity channels generally 56 kbps; all data transmission channels, e.g., 2.4.4.8.9.6 kbps; and higher capacity analog and digital channels, e.g., groups, supergroups, 1,544 Mbps, and 6.3 Mbps channels all of which have the potential to be subdivided into channels which can access the local exchange switched network. Where channels are of higher than voice bandwidth, the surcharge will be applied based on the number of voice capacity analog or digital channels to which the higher capacity channel is equivalent. To illustrate, a 48 kHz analog channel is equivalent to twelve 4kHz channels and thus the surcharge multiplied by twelve applies to each channel. Similarly, a 1,544 Mbps channel is equivalent to 24 voice channels. Since the local exchange network is made up of voice transmission and switching equipment, any private line below voice capacity, e.g., 1.2 or 2.4 kbps provided over analog or digital transmission lines, will be charged the full voice-capacity surcharge. Such lower bandwidth or lower speed lines impose the same burdens on the local network as a full voice line. We will

apply, and those which cannot practically be used to access the local exchange network or otherwise be used to avoid interstate access charges. We believe it is reasonable to include as part of this latter exception radio and television program transmission and Telex lines. In addition access lines associated with the open end of foreign exchange service offered by carriers will not be subject the surcharge since Carrier Common Line charges will be imposed on the open end and, therefore, no uncompensated leakage can occur. The same is true for CCSA ONALs and their equivalents. We would also permit such other exceptions or modifications which are shown to be reasonable and supported by actual operating practicalities and limitations.[65] In addition to exchange carrier-provided private lines and WATS lines, we shall allow exchange carriers to develop reasonable, nondiscriminatory surcharges on interconnected use of exchange services by carriers' publicly-offered interstate services using radio and other facilities (e.g. DTS), and privately-owned microwave relay systems, satellite transmission systems, and other interstate private facilities that would otherwise not be subject to either the surcharge or carriers access charges (that is, that will not employ any end links obtained from the exchange carriers to which private line surcharges would apply). In such cases, we are prepared to consider carriers' proposals for a surcharge to the individual exchange telephone lines[66] which can be connected to such systems. Such a surcharge would have to be filed in tariffs with this Commission.

87. In employing the surcharge approach to the leaky PBX situation, and access charge avoidance generally, we recognize that different customers employ private lines in different ways. This in turn translates into different amounts of use of local exchange service per equivalent voice-grade private line. Certain customers, for example, use private lines in unswitched configurations such that the preponderance of traffic is intracompany. Others use private lines in conjunction with local exchange service almost exclusively to avoid toll charges. Application of the surcharge on a general basis, however, is unavoidable since neither this Commission nor the exchange carriers themselves currently have any reliable way of determining how private lines are internally configured and interconnected on a customer premises, and thus do not know with

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consider allowing local exchange carriers to charge twice the per channel surcharge in cases where the voice-equivalent channel is four-wire instead of two-wire.

[65] For example, multipoint private lines that include large numbers of stations may be shown to be capable of generating far less "leaky PBX" traffic than the total amount of surcharges would appear to indicate.

[66] It would not be practicable at this time to apply such a surcharge on the basis of the entity's interexchange transmission capacity since the exchange carrier appears to have no reliable way of determining how many usable voice equivalent communications channels terminate on a private customer's premises.

certainty how they are used.[67] We believe, however, that by sizing the surcharge on a conservative basis, exchange carriers will recover a reasonable amount of interstate access revenues which would otherwise have been lost, without any undue impact on private line users or on the orderliness of the marketplace. Generally, private line users could satisfy their communications needs equally well if they were to replace private lines with their message service counterparts. The MTS network, for example, can be and is today employed for voice, graphic, written record, facsimile and data transmission. Further, as noted earlier, private line is largely a substitute for telephone toll service, as evidence by the fact that a few very large private users who have CCSA and EPSCS systems account for a major share of all private lines. There is no question, then, that as a result of any increases in the private lines rates service to customers would not be curtailed or impaired in any significant way. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied* 101 S. Ct. 1998 (1981). To the extent private line service is uniquely essential to business operations, e.g., remote telemetering and the like, the value of private line service is measured by such customers in terms of internal operating capabilities rather than in terms of saving money on long distance telephone bills. Most likely, therefore, a nominal surcharge will not appreciably reduce the attractiveness of private line service where it is essential by virtue of the business function which it performs. Finally, even were many private line users to switch to public message network services over a short period of time, the transmission plant used for private line service is in almost all cases fungible with the plant used for public message service, insuring continued ability to provide service. We believe, therefore, that no unreasonable impact will result from the surcharges.[68]

88. We are also requiring exchange carriers to develop their own methods of calculating suitable surcharges to act as a surrogate for

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[67] We would expect as a general matter that under the surcharge pricing scheme, customers most likely to generate large amounts of "leakage" will pay more proportionally than customers who will generate smaller amounts. This is true because switched networks of the CCSA-type or tandem dial PBX variety employ an array of trunks interconnecting switching machines and access lines connecting switching machines to customer stations. Thus, a point-to-point communications path established on a switched network will generally transit three or more separate private lines rather than one, as would be the case, for example, in a simple ring-down non-switched arrangement. Since, under current telephone company rate structures one surcharge will generally apply to each access line and two surcharges will apply to each trunk, it can be seen that a charge multiplication effect takes place in some proportion to the amount of PBX leakage.

[68] We in no way wish to indicate a lack of support for the efficient use of private lines. We emphasize that maximum economically efficient utilization of these lines is to be encouraged. Rather, the surcharge is designed solely to compensate for the use of the local exchange.

revenues forgone as a result of avoidance of carrier access charges and services, such as MTS, which incorporate these charges. This could be done, for example, by various means of estimation from company records and available industry studies as well as customer surveys. It could also be done by sampling the amount of increase in local exchange traffic which comes about as a result of adding intrastate and interstate private lines to customer networks, or by such other reasonable means as may be devised by exchange carriers. We recognize, however, that little time remains between now and October, 1983 when access tariffs are to be filed. Accordingly, we shall use our best judgment to develop an initial surcharge level, pending development of such charges by the carriers. First, we note that private lines attached to a PBX are capable of "leaking" into the local exchange. Because most private lines are connected to PBXs, most private lines are capable of leaking. Although one might assume that all private lines would leak if capable of doing so, we are aware of some private lines connected to PBXs that actually may not be used in connection with local exchange services to make interstate calls. We believe a fair estimate of the number of such lines would be 20 percent of all private lines. Thus, we estimate that 80 percent of all private lines do leak through a PBX or other patching or switching device. We shall assume that 8 percent of all communications made over such lines are interstate, based on the latest data available to us on average subscriber line usage for interstate MTS and WATS services.[69] Eight percent of 80 percent is 6.4 percent, which represents the proportion of all private line usage that "leaks" into the local exchange. We further assume, based on estimates submitted in this proceeding, that nonpremium carriers would pay approximately $400-$500 in monthly carrier usage charge under the access charge plan.[70] Taking 6.4 percent of these figures, we arrive at a range of approximately $25-$32 per month per line. We will select the lower end of this range, $25, as a conservative estimate of what the interim surcharge should be.[71] In cases where the surcharge

[69] Separations Analysis, Form DR9999, AT&T Long Lines (June 1980). We have not been able to find data on the proportion of interstate to intrastate traffic over private lines. We recognize that the 8 percent figure may seem to be overly conservative. First, the 8 percent figure for subscriber line usage does not include interstate calls made over private networks, since such traffic is not currently measured, nor does it include OCC interstate services. Second, it appears that the proportion of interstate to intrastate usage has been increasing since 1980. Third, we recognize that the proportion of interstate usage is actually much higher for many private line users.

[70] If this estimate of non-premium carrier usage charges does not survive our tariff review process, we shall adjust the surcharges accordingly.

[71] We will allow, for good cause shown, a reasonable degree of variation in the level of the surcharge and its associated pricing structure provided a good faith effort is made by the exchange carrier to obtain revenues which in aggregate at least equal the revenues which would have accrued if the surcharge were applied in the prescribed manner. In

is levied, no transport switching or other carrier access charges will be imposed for associated local exchange service. Customers instead will remain subject to business local exchange service charges for the line between the reseller or sharer switch, enhanced service node or PBX and the telephone company's local switch. In addition, all switching functions will continue to be subsumed under the local business rate. The exchange carriers will be required to transmit surcharge revenues to the Exchange Carrier Association monthly in 1984, 1985, and 1986; these revenues will be used to defray carrier common line revenue requirements. In the absence of further action by the Commission, in 1987 and beyond such revenues shall be used to reduce the revenue requirement associated with the Local Switching elements. Based on our estimate that there are between 750,000 and 1,000,000 WATS access lines, and 750,000 and 1,000,000 private lines not currently subject to ENFIA charges,[72] the surcharge would yield annual revenues of between $675 and $900 million. In addition, of the more than 3,000,000 private lines now on file in state tariffs, a very conservative estimate would be that at least one-third of these are clearly interstate in nature.[73] This would add an additional $300 million yielding total estimated surcharge revenue of between $975 million and $1.2 billion.

89. A special formula will be required to apply the surcharge as described above, to facility based and resale carriers who use a combination of resold WATS (which is to be treated under this surcharge approach) and leased private line or carrier-owned transmission plant (which is to be treated under carrier's carrier charges). Carriers such as MCI, for example, use WATS lines to supplement their own facility-based operations while resellers may use WATS to supplement resold private line-based operations. The Bell System Operating Companies are current-

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this way, exchange carriers will, among other things, be able to make reasonable adjustments to, for example, temper customer impact within and among individual private line services.

[72] A surcharge would effectively apply at each end of an interstate private line because of the fact that station terminals or local distribution channels are generally required at each end to connect the intercity channel to a local area station.

[73] As it now stands, where customers do not have end-to-end switched network service, e.g., CCSA, from AT&T, the local channels connecting customer-provided PBX-type equipment to stations within the same exchange area are generally obtained under state tariffs. This is true for other types of interstate private line channels as well. *See, e.g.*, Department of Defense v. The Chesapeake and Potomac Telephone Companies, 75 FCC 2d 45 (1979); AFA Protective Systems, Inc., v. New Jersey Bell Telephone Company, File No. TS 1-78, Common Carrier Bureau, May 15, 1980. When the October 1983 tariffs are filed, all of the intracity channels now included in AT&T's interstate tariffs for CCSA, EPSCS, and AUTOVON will have to be unbundled and obtained from the exchange carriers. We anticipate that at such time, at least these local area or intracity channels which terminate in switched interstate networks will be filed with the Commission.

ly using a billing arrangement, BSOC Tariff FCC No. 11, which enables them to distinguish local exchange usage generated by WATS resale from similar usage caused by facility-based or resold private line-based operations. This is done in order to distinguish between lines which are charged under local business line rates, i.e., those associated with WATS, and those to which ENFIA rates apply. We believe a similar formula would be an appropriate means of implementing our decision.

90. For the future, we are requiring exchange carriers to make concerted efforts to develop charges which reflect actual use of local exchange service by all customers, regardless of their designation as OCC, enhanced service provider, or privately owned or leased system. As we have already explained at length, a wide variety of entities use local exchange service in much the same way as OCCs.[74] Initially all will not pay the same charges for their access services. We are acutely aware of the obstacles to rapid achievement of a permanent solution of the leaky PBX problem and interstate access charge avoidance in general. We believe that in view of such difficulties, the surcharge plan is a reasonable interim approach to achieving some degree of equilibrium among the levels of contributions various customers must make towards defraying interstate access costs. We will henceforth monitor exchange carrier activities to ensure that they are making reasonable efforts to effect a means of charging all users for interstate access in a reasonably nondiscriminatory fashion. We believe the plan we have adopted gives exchange carriers the incentives to pursue various reasonable means, both in the state and interstate service areas, to achieve whatever ratemaking reforms are needed to overcome the interstate access charge avoidance. We will entertain any reasonable, nondiscriminatory proposals which these carriers make in the future and afford such support as we are empowered to give in order to achieve reasonable solutions. Following one year's time from issuance of this order, we will review the progress made by exchange carriers and, if necessary, make further rate level or rate structure adjustments or institute on our own an appropriate proceeding to develop such access charge mechanisms as needed to ensure that all users pay a fair and equitable share of the costs which their usage imposes on the telephone exchange network.

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[74] It can be argued that AT&T uses local exchange service in a way similar to OCCs. It must be recognized, however, that AT&T's use of local exchange service differs in operational terms from all others because of its premium access arrangements. This situation will continue until such time as equal access is provided by exchange carriers to all interexchange carriers.

4. *The Premium Access Charge*

91. Currently the access charge rules require that a premium charge equal to the amount of interstate CPE and surrogate CPE (about $1.4 billion in 1984) be imposed on the carriers providing MTS and WATS services in order to reflect the opportunity cost of premium access.[75] This opportunity cost reflects the fact that only one carrier can be provided premium access. Other things being equal, premium access is of substantial value to any carrier receiving it. The premium access charge was designed to reflect this advantage.

92. We have received petitions from a number of non-premium carriers stating that the $1.4 billion does not reflect the full opportunity cost of premium access, results in too rapid a change from current non-premium access prices, and would stifle current growth of competition in the period immediately preceding equal access and more equal competition. AT&T, the principal carrier receiving premium access, has suggested that changes in the premium access charge be deferred until other more basic access charge problems can be solved. If the Commission does decide to reexamine its prescription of the premium amount, however, AT&T suggests that the current premium be eliminated as inconsistent with cost-based pricing and with fair competition.

93. We disagree with AT&T's assessment that the premium access charge question can be deferred. Determining appropriate charges for OCCs and AT&T is a major purpose of this investigation. If the premium charge differs substantially from the true opportunity cost of premium access, the development of competition and network efficiency could be hindered. Moreover, a premium amount must be established in order to compute the Carrier Common Line usage charges in the tariffs that must be filed in October.

94. We also disagree with AT&T's belief that a premium charge is inconsistent with competition and with cost-based pricing. It is true that

[75] The opportunity cost of scarce assets is a major equalizer in many economic endeavors. For example, farmers leasing prime farm land expect to reap larger harvests from the land, but must also pay high rents. On balance, rents adjust to compensate for differentials in land quality. By establishing the price of a scarce resource, be it either land or premium access, at an amount that an excluded party would have been willing to pay, competitors are put on an equal footing and the resource is put to its most efficient use. The benefits of premium access are, of course, shared by all the carriers that provide the services known as MTS and WATS. We are describing the premium as an AT&T assessment for purposes of this Order because AT&T will be receiving most of the MTS and WATS revenues and will be paying most of the premium charges. There are, however, other carriers that provide interstate MTS and WATS with premium access. The same methodology applies to assessing a premium access charge on other carriers enjoying premium interconnection arrangements for interstate services, e.g., the larger independent telephone companies.

value of service pricing might be inconsistent with cost-based pricing if all carriers could be provided with equal access. As noted by MCI, however, opportunity cost is a fundamental result of scarcity and reflects real economic costs that must be taken into account if cost-based pricing is to lead to efficient use of the network.[76]

95. We also reject claims by some of the OCCs that the methods we have devised to assess the premium do not result in a meaningful premium assessment. Some have argued that a $1.4 billion premium assessment really represents a premium charge of $56 million because AT&T would pay 96% of the assessment, based on its current market share, if the entire carrier common line revenue requirement were recovered through usage charges assessed on all carriers. Admittedly, an additional premium of only $56 million paid by AT&T appears small because AT&T provides a large share of interstate services, with MTS/WATS revenues of about $24 billion in 1982. To the relatively small OCCs, however, a $56 million savings in the charges they pay would be a significant advantage. The $1.4 billion premium would have resulted in a significant reduction in the per minute charge the OCCs would otherwise have had to pay to meet the full Carrier Common Line revenue requirement. Viewed from another perspective. OCC revenues were about $1.5 billion in 1982. *See* Letter from Common Carrier Bureau to Rep. Wirth, Chart 2 (July 8, 1983). A $56 million reduction in OCC access charges would represent about 4 percent of total OCC revenues that, but for the premium, OCCs would have paid to local telephone companies. For these reasons, the comparison of $56 million to total interstate MTS and WATS revenue is not meaningful. The premium is clearly an important factor in maintaining the OCC's ability to compete in the interstate services despite their inferior interconnection to local facilities.

96. If the type of access currently received by AT&T is available only to one carrier both now and into the future, the theoretically correct method to measure opportunity cost would be an auction of premium access. In such an auction various long distance carriers could, through bidding, demonstrate the value of premium access, and premium access, in each exchange, would be made available to the long distance carrier to which it was most valuable. In fact, such an auction would be a practical impossibility because premium interconnection cannot be severed from AT&T and offered to another carrier. Nor could an auction be simulated since carriers would have no incentive to make realistic bids. Even if premium access could be severed from AT&T, the resulting temporary dislocations to the entire telecommunications industry would be too costly. Also, given the relative sizes of AT&T and other bidders, others could probably not reasonably be expected to bid against AT&T for premium

[76] Reply filed by MCI ("MCI Reply") at 8–9.

interconnection. *See, e.g.*, Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (CC Docket No. 81-893), FCC 83-181, para. 21 (released June 21, 1983). Moreover, equal access will become available to all carriers in almost all areas within the next several years.

97. Having concluded that holding an auction to determine the opportunity cost of premium interconnection is a practical impossibility, we have been forced to seek a "second best" alternative that will enable us to make a reasonable estimate of the opportunity cost of premium interconnection. On reconsideration we have concluded that the opportunity cost of premium interconnection should be implemented as a difference between the per minute Carrier Common Line charge assessed to AT&T and the per minute charge assessed to the OCCs, and that this differential is to be determined based upon the competitive advantages that flow from the premium interconnection that AT&T receives compared with the interconnection offered to OCCs. We are accordingly eliminating the premium as a separate rate element and are specifying the factors that are to be applied to the relevant minutes of nonpremium usage in order to compute the differential. We have selected this approach because it is the one most fully supported by the record developed in this proceeding, because it more fairly reflects the value to AT&T of the relatively higher quality access it receives, and because it is easier to implement. After making the comparison set forth below, we applied our expert knowledge of the telecommunications market to determine the differential between the per minute charges assessed AT&T and the OCCs that fairly reflects the competitive advantages of premium access. For the reasons given in paras. 101-27 *infra*, we have decided to set the differential at 35%. In arriving at this amount we also have taken into account the transitional impact on the OCCs of a reduction in the differential that presently exists under the ENFIA tariff and other changes caused by this order. We need to ensure that the development of competition in the interexchange market will not be stifled during the transition to equal interconnection and full cost-based prices. While not as generous as the discount they received under ENFIA, we believe a differential of 35% on Carrier Common Line charges should still enable the OCCs to compete for customers successfully because it should adequately offset the competitive advantage that AT&T enjoys from its premium access.

98. We concluded in the *Access Charge Order* that the amount of the premium should equal CPE costs, at least in 1984, because the estimated CPE costs reasonably approximated our estimate of the value that AT&T derives from premium access. We noted in Paragraph 159 of the *Access Charge Order:*

> We have invited proponents of a large or a small differential in the access compensation paid by OCCs and the telephone company partnership to submit a case for a particular differential both in this docket and in proceedings relating to the ENFIA agreement. Those participants have apparently been unable to produce submissions that have much evidentiary value. In these circumstances, we necessarily must exercise our best judgment to establish an appropriate premium amount.

We exercise this judgment below.

99. Several of the petitioners have produced submissions in the reconsideration proceeding that are designed to provide a more complete record on this subject. Although we cannot accept any of the suggested methodologies or calculations in their entirety, these submissions have been of material assistance to us in our efforts to determine a more reasonable estimate of premium value on reconsideration.

100. The predominant form of OCC interconnection (ENFIA–A) is line-side connection to end offices. AT&T correctly observes that ENFIA–B, ENFIA–C and Digital Facilities for Other Common Carriers (Tariff FCC No. 268) are available to OCCs and that these facilities provide more dependable levels of signaling and reduce the need for interconnection equipment. The cost and frequent unavailability of these service offerings in the past, however, has limited their value. With a fourth alternative that is clearly superior to any of these, *i.e.*, equal access, on the near horizon, OCCs may be understandably reluctant to incur the costs of converting to any of the current alternatives to ENFIA–A even if they should become more readily available. For this reason, we shall compare premium access only to ENFIA–A interconnection for purposes of determining the differential.

101. The technical features of premium interconnection that distinguish it from ENFIA–A are not difficult to list. They include: trunk side, four-wire connection to local switches; transmission of traffic through fewer local switches from end to end than OCC traffic usually experiences; answer supervision and automatic number identification ("ANI"). AT&T customers need dial only ten or eleven digits to identify the line they wish to call and may use rotary dial phones that produce only pulse signaling to pass this information to the AT&T switch. Customers of an OCC must dial twenty-two or twenty-three digits to place a call and they cannot rely on pulse signaling to transmit this information to the OCC's switch. To understand why the differential should be based on these factors, however, it is necessary to understand the competitive effect of these technical differences on interexchange carriers' service offerings.

102. Trunk-side, four-wire interconnection and transmission through fewer switches enables AT&T to offer its customers quality transmission without its having to employ the interconnection equipment and echo suppressors of cancellers upon which the OCCs must rely to approximate

this quality transmission.[77] With ANI, AT&T can identify the line from which a call is placed (and to which it will usually be billed) while answer supervision tells AT&T when the called party has answered and when that party hangs up. Together ANI and answer supervision enable AT&T to bill its customers accurately for the calls they successfully complete. In contrast the OCCs must rely on personal identification numbers ("PINs") to identify the party who should be billed for calls. The need for PINs increases the opportunity for fraud and a correspondingly higher percentage of uncollectibles than AT&T experiences. Lack of ANI creates similar problems for the OCCs. Because they do not know when the person called by one of their customers has answered, OCCs with ENFIA–A lines must assume that the called party will answer within a fixed number of seconds. As a consequence OCC customers who let the telephone continue ringing too long may be billed for calls that were never completed, which can create customer dissatisfaction. Other customers may be able to transmit all the information they wish to give within the fixed period and thus escape charges for their calls.

103. Another significant difference between the interconnection offered AT&T and ENFIA-A is the difference in the steps a customer must take to be able to use these carriers' facilities. AT&T has estimated that in 1984, 40% of all telephones will be rotary dial telephones capable of transmitting only pulse signals.[78] As we have already noted, the OCCs cannot compete with AT&T for the business of owners or lessees of such phones without adaptors for or replacement of the phones. While the remaining 60% of all telephones can be used to reach OCC facilities to place toll calls, their owners must dial seven digits to reach the OCC switch, five or six more digits corresponding to their PIN, and only then the ten digits corresponding to the area code and telephone number of the person they are trying to call. Since a PIN must be used, an OCC's switch is seized over longer periods for each call, requiring larger, more expensive switching equipment than AT&T needs to handle the same number of calls. Customers must spend time in setting up the calls to the OCC, in waiting for an OCC ring and in OCC verification of the PIN. There is an increased probability of error in dialing the longer OCC codes; this error will in turn increase OCC switching time per call. The OCC will also be accruing access minutes and concomitant access charges while the customer completes his PIN and ten digit number. AT&T's access minutes will not begin to accrue until after the customer has completed dialing the

[77] *See* USTS Petition, Attachment 2 at 4-2, 4-6; SPC Petition, Appendix A, Attachment 1 at 4.

[78] SBS found the AT&T estimates not inconsistent with its estimates of the numbers of rotary phones and touch-tone phones to be in use in 1984. SBS Reply at 25. While SPC has challenged this estimate, it has offered no counter estimate. *See* SPC Reply at 9.

ten (or eleven) digit number. Moreover, prior to implementation of the MFJ's equal access requirement, AT&T will continue to enjoy the position of default carrier for all customers who do not seek out its competitors on their own initiative.

104. Weighing all these factors we conclude that the premium interconnection that AT&T now enjoys is clearly more valuable than that offered to the OCCs. This value clearly arises as much from the inconvenience and expenses that AT&T can avoid as from the benefits it provides. Applying our expertise, we find for purposes of this decision that applying a factor of .65 to OCC access minutes for assessing the per minute Carrier Common Line charge in 1984 will establish a reasonable measure of that value. Such an assessment probably cannot be made with exact precision. Even assuming that the necessary data could be developed, the need for prompt Commission action to set the premium value is pressing, and a more accurate assessment of the opportunity cost of premium access would require further proceedings. If the 35% differential were not merely a short-term solution to the temporary problems created by unequal access, and if we were confident that further proceedings would yield better data, we would be prepared to go through such proceedings. We are only relying on this differential to carry the industry through the interim until equal access is available to OCCs virtually everywhere. For these reasons we believe that we have reached the "reasonable prompt decisionmaking point" at which we must be prepared to say "To the best of our knowledge and expertise at this time [the 35% differential is] just and reasonable. Perfect, perhaps not, but just and reasonable, yes." *See MCI Telecommunications*v. *FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980).

105. The transition we are creating through this 35% differential for interexchange carriers as they move to a competitive environment in which access is equal in and based on cost is designed to avoid affording undue competitive advantage to any carrier. In selecting the 35% figure in pricing the Carrier Common Line element we have taken into account the possibility that transport charges for OCCs may result in their paying higher overall rates than they are paying now for ENFIA interconnection. We have recently received letters from some of the OCCs that urge us to take preliminary estimates of the 1984 access charges into account in establishing the 1984 premium assessment. These submissions are authorized as *ex parte* comments in a nonrestricted rulemaking proceeding and have been included in the docket file. In particular, MCI claims that the BOC Central Service organization preliminary estimates would produce a total NTS and traffic sensitive charge per ENFIA line that is twice as large as the present combined charge for ENFIA elements 1, 2, and 3. This appears to be attributable in part to estimated transport charges that

are much higher than ENFIA Element 1 rates that OCCs have been paying for the lines between local telephone company switches and the OCC switches. We expect that any increased charges will be fully supported as required by Section 61.38 of our rules, and we intend to examine the support data carefully to assure that any rate increases are fully justified. Our goal is to ensure that an appropriate competitive balance is maintained during the transition. If our monitoring of marketplace developments reveals that the 35% differential confers an undue competitive advantage upon either AT&T or the OCCs, we would be prepared to review the level of the differential expeditiously to ensure that the competitiveness of the marketplace is maintained and that the overall public interest is served.

106. We have decided that we should not retain the four year phase-out for the premium differential since premium access will no longer be related to CPE costs. The premium charge should be phased out at the same rate at which equal interconnection is provided. However, we recognize that progress to equal access cannot be predicted with absolute certainty at this time. We have begun the rulemaking proceeding in which we shall set the timetable and standards governing introduction of equal access to independent telephone companies' local networks. *See Notice of Proposed Rulemaking in MTS and WATS Market Structure, Phase III,* CC Docket No. 78-72, Phase III, FCC 83-178, released May 31, 1983. It is also possible that the schedule set by the MFJ for the BOCs' offerings of equal access may prove too ambitious for those companies to achieve. Consequently, it may be necessary to reevaluate the rate at which the differential is to be reduced in later years. The differentials for later years appearing in the rules are accordingly described as default factors that will be used in the absence of a Commission order establishing different factors. We have nonetheless concluded that these default differentials should be related to the MFJ schedule for equal access and are accordingly specifying a .23 differential for 1985, a .12 differential for the period from January 1, 1986 until August 31 of that year, and no differential after that date.

107. In an attempt to ensure that the 35% differential reasonably reflects the opportunity cost of premium access, we have approached the task of measuring this cost from another perspective, involving certain reasonable assumptions. This approach generates an estimate of the opportunity cost of premium access that is close enough to our 35% differential to support our confidence that this figure fairly approximates that opportunity cost. The information contained in Petitions for Reconsideration and responses filed by AT&T and the OCCs can be used to determine a general range within which the opportunity cost is likely to lie.

108. The analysis below focuses on the amount that AT&T, the only carrier capable of taking advantage of premium access within the next several years, should be willing to pay to be allowed to preserve its premium access. The amount should be identical to the amount that a hypothetical non-premium carrier having AT&T's market share would be willing to pay to become the premium carrier. We focus on costs that can be avoided by a carrier that has premium access but that AT&T would have to bear if it had inferior access, and on the revenue loss that would result if AT&T were not able to offer its customers superior quality communications as a result of inferior access. We have not attempted to adjust for transitional costs that would be created if AT&T were suddenly denied premium access. Such costs are not a part of the opportunity cost of premium access.

109. The additional costs that AT&T, or a hypothetical OCC having AT&T's market share, would incur fall into four principal categories—replacement of rotary telephones, collection losses, toll switching costs and other equipment costs.

110. Rotary dial telephones cannot be used to transmit signaling to non-premium carriers who use ENFIA–A or ENFIA–C connections. Such telephones can be used with an ENFIA–B connection, but ENFIA–B is not universally available. Moreover, the non-premium carriers are likely to be reluctant to convert existing ENFIA–A operations to ENFIA–B or ENFIA–C when a fourth alternative that is clearly superior to the A, B and C connections will become available in the not too distant future.

111. If AT&T were limited to ENFIA-A connections it would either have to incur the cost of supplying tone equipment to local exchange service subscribers who do not have them, or offer a discount that would be sufficient to induce such persons to acquire such equipment. Such a discount would include an amount to offset higher monthly local exchange service rates that are typically charged for tone dialing lines. If it did not do so, it would abandon that portion of the market to a carrier that had premium access.

112. AT&T has estimated that in 1984 40 percent of the phones will continue to provide pulse signaling only. Costs of converting these phones to non-premium compatibility equal about $25 per phone.[79] A total customer investment of $1 billion (the product of 40 million phones and $25 per phone) would be required to allow dial pulse phone users to access non-premium interstate services. Assuming a three-to-five year life and a 15 percent customer cost of capital, this investment can be converted into an annual cost of about $275–408 million.

[79] Supplemental Opposition on Behalf of the American Telephone and Telegraph Company Interexchange Operations ("ATTIX Opposition") Appendix at 2-3.

113. Adjustments to these figures are necessary to allow for the customer benefits from being able to make faster local calls through use of tone dialing. We believe that a reasonable estimate of the cost that AT&T would incur to be able to offer a non-premium service to the customers who would not otherwise have abandoned rotary telephones would fall between $100 and $300 million.

114. One result of non-premium access is a high level of non-premium carrier uncollectibles. Estimates of the difference between AT&T and OCC uncollectibles range from 3.14 to 8 percent.[80] The higher estimate reflects recession conditions in 1982, the lower estimate is probably more representative of normal conditions.

115. If AT&T received non-premium access its revenues would be reduced by additional uncollectibles that would be attributable to such interconnection. It would also incur some added costs to handle customer complaints that are attributable to such arrangements. One major reason for the difference in uncollectibles is in that local companies will discontinue local service if customers fail to pay their AT&T bill, but will not do so for other long distance carriers. As a result of the billing rules prescribed herein, this advantage will no longer hold. Thus, we have concluded that a residual revenue loss of between one and two percent would be a likely result of remaining differences.

116. We have derived a projected 1983 MTS and WATS revenue requirement of $24.1 billion from data included in the AT&T Tariff Filing Reference Package filed March 1983. If the $2 and $6 per line end user charges had been in effect, that revenue requirement would have been reduced by about $3.5 billion.[81] The resulting $20.6 billion would have to be adjusted upward for 1984 to reflect increased investment and expenses. An estimate of $21.6 billion in MTS and WATS revenues appears reasonable, and would produce an adjustment of $216 to $432 million per year for uncollectibles and complaints.

117. Non-premium access requires the use of a seven digit number for the OCC switch and multidigit PIN. Since a PIN must be used, non-premium carrier switches are seized over longer periods, requiring larger and more expensive switching equipment. As we have already observed, customer time is also used in setting up the call to the OCC, in waiting for an OCC ring and in OCC verification of the PIN. There is, of course, a probability of error in dialing long codes and this will add to the amount of non-premium carrier switching time used per call. On average, about 10

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[80] USTS Petition, Attachment 2 at 4–2, 4–6; SPC Petition Appendix A, Attachment 1 at 4.

[81] This is based upon an assumption of 100 million lines, which appears to be a reasonable approximation.

seconds per call are likely to be used for such set up.[82] Since an average call lasts approximately 8 minutes and there are some 50.1 billion minutes of premium calls made,[83] AT&T toll switches would be used an additional 1.045 billion minutes if AT&T were compelled to use non-premium access. While switching costs vary, an estimate of 1–3 cents per minute appears reasonable. Thus an additional 1.045 billion minutes would add $10.05–31.35 million in toll switching costs.

118. USTS has estimated that OCCs incur costs of $98 per month per ENFIA line ($49 in equipment costs and $49 in operating costs) to offset the effects of inferior interconnection.[84] SPC estimates additional equipment costs of $69 per month per ENFIA line.[85] We have already allowed for many of these costs as effects of the absence of rotary dial switching, billing losses and additional toll switching costs, but some of the costs described by USTS would not be reflected in those cost estimates. In particular, the USTS estimates include echo suppression equipment ($7 per month per line), interconnection equipment ($22 per month per line) and E & M signaling equipment ($12 per month per line).[86]

119. AT&T claims that no additional costs should be claimed for echo control because echo control is necessary for all satellite circuits.[87] USTS responds, however, that the costs if claims represent additional costs, e.g., use of echo cancellers rather than echo suppressors. We find that some additional costs should be attributed to inferior interconnection.

120. AT&T correctly observes that ENFIA–B, ENFIA–C and Digital Facilities for Other Common Carriers (Tariff F.C.C. No. 268) are now available and that these facilities provide more dependable levels of signaling and reduce the need for interconnection equipment. Although the cost and frequent unavailability of these services has limited their value, some reduction in the estimated cost of signaling and interconnection equipment is warranted.

121. USTS has revised its estimates of equipment costs in a letter dated July 14, 1983, from J.C. Reynolds, President of United States Transmission Systems, Inc. The Reynolds letter states that echo suppres-

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[82] SPC has estimated that additional dialing and connection time resulting from premium access "could add 16 to 50 seconds to a call or as much as 20 percent to the actual conversation minutes of a four minute call." SPC Opposition at 20. This estimate appears unreasonably high. OCC minutes are inflated by the amount of time customers spend dialing PIN and long distance numbers (totalling about 14–17). Numbers can be dialed quickly on tone equipment. Moreover, many customers have automatic dialing equipment. For these reasons, an estimate of 10 seconds appears more realistic.

[83] This estimate is based on AT&T's most recent estimate of originating MTS–WATS conversation minutes.

[84] USTS Petition at Attachment 2.

[85] SPC Petition at 10–12.

[86] USTS Petition at Attachment 2.

[87] ATTIX Opposition. Appendix at 7.

sor costs are $23.00 per month rather than $7.00, interconnection equipment costs are $24.00 per month rather than $22.00 and E&M signaling costs are $14.00 per month rather than $12.00. Although this letter was received within the period permitted by our *ex parte* rules, we do not believe it would be appropriate to attach much weight to the revised estimates in view of the large discrepancy between the earlier USTS estimate and the July 14 estimate of costs and the very limited opportunity for a response by other interested parties. In view of all the circumstances, we find that $31.00 per ENFIA line per month is an appropriate estimate of additional signaling, interconnection and echo suppression costs. This would produce a total annual cost for 95,000 ENFIA lines of about $35.34 million.[88] USTS used a 25:1 factor to convert such OCC costs to the costs that AT&T would incur because OCCs account for about 4% of the total market. Because AT&T would not have to incur some costs incurred by OCCs, the correct factor is 24:1, resulting in an AT&T other equipment cost of about $848 million.

122. The combined costs that AT&T would avoid through premium access ($100–300 million for rotary telephone conversion, $216–432 million billing costs, $10–31 million toll switchings costs, and $848 million other equipment costs) range between $1,174 and $1,611 million.

123. The ability to access dial pulse customers and to avoid investment needed to compensate for inferior access reflect only a part of the opportunity cost of premium access. The carrier able to receive premium access is able to provide a service with superior technical standards. Such a superior product has value to most customers and is essential to some uses such as data communications and communications with the hearing impaired. The carrier receiving premium access is also the default carrier and able to receive otherwise unrouted calls.

124. The premium access cost savings calculated above should allow somewhat higher prices to be charged by the premium carrier. In particular, the premium carrier need not offer a price reduction in order to persuade customers to convert to touch tone type service. The technical superiority of premium access will allow a further price differential. If all other parameters were equal, we estimate that this technical superiority would allow an overall price differential of between 2 and 5 percent. (Of course this would convert into a far larger Carrier Common Line differential). Still assuming $21.6 billion in MTS–WATS revenues, this differential would allow an additional premium ranging between $432 and $1,080 million. Although the 2% to 5% differential is smaller than the current differential offered to non-premium carriers, it is evident that a

[88] The Reynolds letter projects 105,000 lines in 1984. We will not use that number because it presumably assumes a higher market share than the one we are using for conversion purposes.

portion of the existing differential is generated by a desire on the part of non-premium carriers to expand market share and overcome consumers' habit of using AT&T, something that should not be factored into the premium.

125. An adjustment is necessary to reflect the use of access minutes to compute usage charges for the Carrier Common Line usage charge and some of the nontraffic sensitive elements. We estimate that use of access minutes rather than conversation minutes to assess OCC charges will add 2 percent to the number of OCC access minutes, compared to AT&T. *See* paras. 70–74, *supra*. To offset this increase in OCC access minutes, an additional adjustment to the premium of between $67 and $88 million would be required.[89] The total premium would range between $1,673 and $2,779 million. The mid-point of this range is $2,226 million.

126. The most recent industry estimates of 1984 revenue requirements are reflected in a July 19, 1983, letter from Thomas J. O'Reilly, Counsel for the United States Independent Telephone Association, that has been included in the docket of this proceeding. The O'Reilly letter states that the total industry interstate NTS revenue requirement will be about $10.7 billion. We would estimate that the end user charges of $2 per month for residential and CENTREX–CO lines and $6 per month for other business lines would produce annual revenues of about $3.5 billion. We also estimate that surcharges on Special Access facilities should produce other $1 billion in annual revenues in 1984.[90] If these estimates are correct, the carrier portion of the common line revenue requirement that must be recovered from MTS, WATS, open end FX–CCSA, and MTS–WATS equivalent services would be $6.2 billion. Assuming 100 billion minutes of use of local carrier facilities by interexchange carriers in 1984 and assuming that MTS and WATS accounts for 96% of this traffic,[91] our 35% differential would result in a premium of $2.17 billion.

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[89] We have assumed total common line costs of $10.7 billion. In 1984, $3.5 billion is to be recovered through end user charges and $1 billion through private line surcharges leaving $6.2 billion to be recovered through carrier charges.

Before calculating a minute adjustment we had estimated a premium within the range of $1.606 billion and $2.691 billion. If AT&T is assumed to have 96 percent of the market and if AT&T's share should be inflated by 2 percent due to the extra minutes for which nonpremium carriers are billed, AT&T should pay an additional premium ranging between $67 million ($3.509 billion times .96 times .02) and $88 million ($4.41 billion times .96 times .02).

[90] *See* para. 88, *supra*

[91] In their recent letters to this Commission, see para. 99 *supra*, the OCCs have suggested that these assumptions are reasonable. Based upon these figures, the per minute, per end charge that AT&T would pay for the Carrier Common Line element would be 6.3 cents while the OCCs would pay 4.1 cents.

127. In sum, it can be seen that our 35% differential produces results comparable to those obtained under the foregoing detailed opportunity cost analysis. This analysis confirms that the 35% differential is a reasonable estimate of the value of AT&T's premium access. As modified herein, AT&T will now be paying approximately $87 million for premium access, rather than $56 million under the *Access Charge Order*, a change of $31 million. However, MTS revenue requirements are being reduced by $4.5 billion through end user charges and surcharges. Therefore, it should be clear that our action in reassessing the premium will be of insignificant effect on the magnitude of rate reductions for MTS rates made possible by the access charge plan.

B. *End Office Charges*

128. The *Access Charge Order* established five different rate elements for the use of end office facilities. Two of those elements, Line Termination and Local Switching, relate to the use of local dial switches. The other three, Intercept, Information and Operator Assistance, relate to the use of manual switchboards and operator services.

1. *Line Termination and Local Switching*

129. We allocated to the Line Termination element all non-traffic Category 6 central office equipment (COE) not used to provide interface arrangements at the end office between the interexchange and exchange carriers' facilities. To Local Switching we allocated all traffic sensitive (TS) Category 6 COE. AT&T and Discount Phone have proposed that we revise our rules for recovering the revenue requirement associated with TS Category 6 COE. Section 69.107 now separates interstate switched services into two categories based upon the differences in the costs associated with their use of the switch and imposes charges upon interexchange carriers for their use of local switching facilities based upon their relative use of this equipment. The minutes of use attributable to services in the same category as MTS are weighted more heavily than the minutes of use attributable to services in the other category because of the relatively higher costs associated with their use of the switch. *See Access Charge Order* at para. 222; 47 CFR. 69.107(c).

130. AT&T criticizes the existing rule and asserts that rates for Local Switching should be facilities rather than service specific. AT&T claims that the existing rule also fails to acknowledge the coming changes in interconnection that is provided to both AT&T and other interexchange carriers. AT&T proposes to cure these alleged flaws by redefining the Local Switching element to consist of two categories of service, Transport Termination and Common Switching. With the former AT&T would associate all equipment in a switch that terminates the line to trunk

facilities from the interexchange carrier's point of presence.[92] Common Switching would correspond to "the traffic sensitive local exchange switching used by a carrier."[93] It presents rule revisions that would give carriers substantial discretion to apportion the revenue requirement associated with Local Switching between the two categories and into subcategories and to develop the rate structure for both Common Switching and Transport Termination.[94] It asserts that these revisions would enable a telephone company to develop a cost-based rate structure reflecting the functionally different kinds of access they offer.

131. In its Opposition SBS asserts that cost-based rates for access services should be delayed until access is available to all interexchange carriers.[95] Ad Hoc believes that charges for Local Switching should be unbundled to reflect differences in inferior or superior access arrangements, but it finds the AT&T proposal to achieve this result too lacking in detail.[96] While agreeing that AT&T proposed change identifies defects in the existing rules, SPC concludes that the AT&T alternative fails to cure these defects.[97]

132. The flexibility that AT&T specifically requests for pricing the Local Switching element reflects a belief that our access charge plan should be revised to permit telephone companies to recover their costs for both end user and traffic sensitive access elements through a mixture of non-recurring charges and flat and usage-based periodic charges and that the carriers rather than this Commission should determine what that mixture should be. This philosophy is further reflected in AT&T's more general proposal that we give telephone companies the discretion to establish charges, subelements and service categories for access elements in addition to those for which Part 69 already provides.[98] While we believe that the access charge rules should evolve over time to reflect the menu of access services that AT&T foresees, we believe that the broad discretion AT&T proposes must await the development of the costing tools that can support the additional disaggregation of costs. Therefore we reject this proposal. We shall, of course, entertain request for waiver of the rules prescribing rate structures for specific access elements to permit an exchange carrier to impose non-recurring charges or to unbundle an access elements into additional subelements. We would expect the waiver request to include a description of the rate structure the telephone company would propose. We would also require a showing that granting

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[92] *Id.*

[93] AT&T Petition at 22, A9.

[94] *See id.* at A9–A10.

[95] *See* SBS Opposition at 3–4.

[96] *See* Ad Hoc Opposition at 21–22.

[97] *See* SPC Opposition at 15–24.

[98] *See* AT&T Petition at A–6.

the waiver would in no way undermine any of the policy goals of this proceeding.

133. Discount Phone requests that we apportion to the Pay Phone element and thus recover from end users the costs associated with the use of TS Category 6 COE to complete pay calls made from pay telephones.[99] We deny this request. We have substantially revised the rules governing recovery of the interstate revenue requirement associated with pay telephones and associated facilities. The Discount Phone proposal could not be implemented under the revised plan. *See* paras. 55–62, *supra.* Even if we had not taken this step, however, we would deny the request because it is in conflict with an underlying premise of our access charge plan that switching costs should be recovered directly from interexchange carriers rather than end users.

134. On reconsideration we do find it necessary to revise Section 69.107 in two respects. As written, the rule would require that interexchange carriers be assessed a Local Switching charge per conversation minute. For reasons we have already discussed in paras. 70–74, *supra*, we have concluded that access minutes should be the basis for charging interexchange carriers for the Local Switching element. We have also determined that the categories of local switching service should be redefined to reflect proposed changes in the *Separations Manual* and in our rules for apportioning investment and expense among the access elements. The Docket 80–286 Joint Board has adopted a proposal to revise the *Separations Manual* to acknowledge the use of local dial switching equipment by interexchange carriers with ENFIA interconnections. The *Manual* attributes minutes of use by such carriers to the appropriate jurisdiction but will apply no toll weighting factors to such minutes. Thus the *Manual* would treat ENFIA–B dial equipment minutes of use like ENFIA–A and ENFIA–C minutes. We believe this uniform treatment should also be reflected in access charges. For these reasons we are redefining the Local Switching subcategories. Into one subcategory we are placing local dial switching for MTS, WATS and services receiving access to the local switch equal to that received by MTS and WATS and into the other we are placing local dial switching provided for other services.

2. *Intercept*

135. Intercept services triggered by an incorrectly dialed telephone number are provided to all interstate callers regardless of the switched interexchange service upon which they have relied to make their calls. For this reason § 69.108 of our rules charges all interexchange carriers based

[99] Discount Phone Petition for Reconsideration of the Third Report Order ("Discount Phone Petition") at 4.

on relative use of local switching facilities.[100] Claiming that its proposal will simplify recovery of costs associated with providing intercept services, AT&T has recommended that we eliminate the Intercept element and apportion these costs to the Local Switching element. We do not believe that this proposal would substantially simplify preparation of access tariffs and, for this reason, deny the request.

3. *Operator Assistance*

136. We have concluded that because of developments in the AT&T divestiture proceeding we should eliminate the Operator Assistance element from access charges. In late December, 1982, AT&T filed a Plan of Reorganization in proceedings to implement the Modification of Final Judgment (MFJ) in *United States v. American Telephone and Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *affirmed sub nom. Maryland v. United States*, 103 S.Ct. 1240 (1983). Under that plan facilities used to provide call completion and assistance services will be assigned to AT&T after the divestiture. Most of these facilities are included in Category 1 COE and, under our apportionment rules, the associated revenue requirement would have been allocated to the Operator Assistance access element. In the *Access Charge Order* we had expanded our definition of access to correspond with the MFJ. Under this expanded concept of access we have included operator assistance services for long distance calls even though they were generally unavailable to interexchange carriers other than AT&T. Since the BOCs will no longer be providing such services after divestiture, there is no longer a need to include operator assistance services among access functions. Accordingly we are eliminating this access element. We discuss the appropriate apportionment of the investment and expense previously assigned to this element at paras. 163–167 *infra*.

C. *Transport Charges*

1. *Proposed Modifications*

137. We created two elements, Common Transport and Dedicated Transport, to correspond to the kinds of facilities a local carrier would provide to transport an interexchange carrier's traffic between its point of presence and the end office at which that traffic originates or terminates. Section 69.111 (Common Transport) and § 69.112 (Dedicated Transport) prescribe a rate structure for recovering the costs of providing these access facilities. Several parties have sought either clarification or

[100] We are amending § 69.108 to require charges based on access minutes rather than conversation minutes.

revision of these rules.[101] Prior to the filing of any petitions for reconsideration of our *Access Charge Order*, however, AT&T and the BOCs filed a petition for waiver of §§ 69.111 and 69.112. In response to that petition we have recently granted a one year waiver of these rules. *See American Telephone and Telegraph Company*, FCC No. 83-287, released June 28, 1983. For the first year that access charges are in place each exchange carrier may recover the costs of transporting an interexchange carrier's interstate traffic between its point of presence and the originating or terminating end office through rates that do not comply with §§ 69.111 and 69.112 of our rules. This should enable the BOCs to file charges that comply with the MFJ and the Communications Act and still to participate in the exchange carrier association's tariff for such charges. We intend to scrutinize closely the carriers' initial access tariff filings in this respect, and if necessary to initiate a proceeding shortly to explore whether §§ 69.111 and 69.112 should be revised to reflect more accurately both the pace at which the option of equal interconnection for all OCCs becomes a reality and the facilities through which it is offered. For this reason we shall not address the proposed clarifications and modifications in this *Order*.

2. *Averaging of Transport Charges*

138. Although we are not addressing proposed modifications of the transport charges at this time, we have decided to address proposals suggesting that we require some averaging of transport charges.

139. When we adopted the access charge rules, we concluded that we should not require the averaging or pooling of the traffic sensitive rate elements. We observed in paragraph 319 of the *Access Charge Order*:

> Any deaveraging of the access charges will not, of course, automatically lead to a deaveraging of the interexchange carrier's end user rates. Even if that result did occur, it appears doubtful that the differentials would be large enough to impose a significant hardship upon end users in particular areas. Present and proposed separations methods for the apportionment of traffic sensitive plant do not create the same kind of discrepancies that are or may be reflected in interstate NTS costs. Therefore, we will not preclude separate tariffs for the traffic sensitive elements.

140. Several petitioners have asked us to reconsider that aspect of our decision.[102] These petitioners contend that there are substantial discrepan-

[101] *See, e.g.*, GTE Petition at 18–19; Petition for Reconsideration and Clarification of the Rural Telephone Coalition ("RTC Petition") at 6; SPC Opposition at 26.

[102] See especially RTC Petition at 6–7; Petition for Reconsideration and Clarification by Rural Electrification Administration ("REA Petition") at 5–7; Independent Alliance Petition at 17–18.

cies in transport costs—particularly in trunks between Class 4 and Class 5 offices—from exchange to exchange. Such petitioners also claim that AT&T is likely to revise MTS rates to reflect transport cost differences if access charges for transport are deaveraged, and that such a revision of the MTS rate structure could cause severe hardships for some end users and the telephone companies that serve them.

141. The State of Alaska has raised somewhat similar concerns with respect to the effect of the *Access Charge Order* upon the effort to integrate Alaska and Hawaii interstate MTS rates with the averaged rate schedule that is used in almost all other places. Alaska has filed a petition for reconsideration and a separate petition for rulemaking that asks us to institute a proceeding relating to rate integration.[103] The existing divisions/settlements process has always combined average rates to end users with deaveraged access service compensation to local exchange carriers. Thus, the existence of deaveraged access charges for transport would not preclude us from requiring a continuation of the current averaged rate arrangement.[104]

142. We examined the history of MTS rate averaging in the *Third Supplemental Notice* in order to determine whether we have established any policy. We found that prior Commission precedents have established a policy that prohibits selective deaveraging that does not reflect cost differences, but that we have not established a policy with respect to deaveraging that does accurately reflect cost differences. We concluded that such deaveraging was too hypothetical to warrant a proceeding to develop a policy because it would be very difficult to demonstrate that deaveraged MTS rates do accurately reflect cost differences.

143. We do not believe that the mere possibility of MTS deaveraging warrants any change in our decision to permit deaveraged transport charges. As noted, deaveraged compensation of exchange carriers presently exists in today's environment of averaged MTS rates. If we ultimately conclude that deaveraging of MTS rates should not be permitted, we can enforce such a policy directly even if the MTS access charges are deaveraged. We would not permit any deaveraged MTS rates without first completing a full policy and impact review of such a fundamental pricing shift.

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[103] That petition for rulemaking will be addressed in a separate order.

[104] We have no reason to expect the filing of a deaveraged MTS tariff in October 1983. AT&T obviously would not have enough information about the transport charges that will be filed by or for the various exchange carriers to prepare the necessary cost justification. Moreover, 1984 access charge tariffs could not provide a justification for the sort of exchange-by-exchange deaveraging some petitioners appear to fear. Several of the Bell Operating Companies have elected to join the 1984 association tariffs. Therefore, the association transport charges for 1984 will in effect reflect considerable averaging of short and long trunks between Class 4 and Class 5 switches.

3. *Non-Recurring Charges*

144. Some parties have suggested that access charges should include nonrecurring charges for planning, development and installation of facilities.[105]

145. Such charges might be viewed as either end office or transport charges. We agree that Part 69 does not, but should, include guidelines for developing such charges. Such guidelines are needed to protect the financial interests of both exchange and interexchange carriers. The use of nonrecurring charges for planning, development and installation of facilities used by interexchange carriers raises many of the same concerns that the dedicated and common transport rates have already raised. For this reason, we intend to scrutinize closely carriers' tariff filings in this respect, and if necessary to develop guidelines for costs that may be recovered through non-recurring charges at the same time we determine the appropriate rate structure for recovering the costs now allocated to the Dedicated and Common Transport elements. *See* para. 137, *supra.*

D. *Other Charges*

1. *Billing and Collection*

146. Under the access charge plan, telephone companies choosing to offer billing and collection services or billing information services to interexchange carriers will recover the costs of providing these services through the billing and collection access element. We had included this element in our access charge plan because under the terms of the MFJ billing and collection services are considered access services that a BOC would include in its access tariffs. We retain, however, some doubt that such services are an appropriate subject for Title 11 regulation. We intend to examine this question subsequently, but in the interim we shall retain the Billing and Collection access element to enable exchange carriers to file tariffs for the billing functions they may perform on behalf of interexchange carriers.[106]

147. In contrast with the rate prescription rules for the other traffic sensitive elements, the rule governing charges for Billing and Collection would permit carriers to recover more than the prescribed rate of return on investment allocated to this element; but these charges must be nondiscriminatory. *See* 47 CFR 69.114.

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[105] *See* AT&T Petition at A6; Central Petition at 13–14.

[106] Billing functions would include some or all activities associated with the collection and recording of billing information needed to calculate the billed amount, the processing of such billing information into customer invoice form, mailing of bills to customers including any preparatory work, collection of monies from billed customers, and the disbursement of monies collected from the billed customers.

148. Some of the interexchange carriers have urged us to set a rate of return for the Billing and Collection element.[107] Both SBS and USTS describe billing and collection services as bottleneck services and assert that an exchange carrier could extract monopoly profits if it is not subject to a rate of return constraint. We believe this mischaracterizes the nature of these services. No one has demonstrated that exchange carriers do have the power to extract monopoly profits from these services. At the present time interexchange carriers other than AT&T do not rely upon local companies to provide these services. Each of these carriers must weigh for itself whether the additional billing information or related services that may soon become available are worth the price the local company will impose. As AT&T suggests in its opposition, if an interexchange carrier considers a local company's charges for billing services to be too high, it can, if necessary, construct and rely upon its own billing facilities. As long as the rules require a local company to offer each billing related service to all interexchange carriers if it offers the service to one of them and to establish reasonable, nondiscriminatory charges, we believe that they prevent the local company from awarding any undue competitive advantage to AT&T or any other interexchange carrier. We revise § 69.114 to incorporate the reasonableness standard for rates associated with the Billing and Collection element in order to reflect the duty to charge "just and reasonable" rates for all tariffed services imposed by Section 201(b) of the Communications Act, 47 U.S.C. 201(b).

149. The Rural Telephone Coalition has suggested that interexchange carriers be required to advise exchange carriers whether the interexchange carrier will use their billing and collections services at this time in order to assist exchange carriers in formulating their tariffs. It would be unreasonable to expect interexchange carriers to make any commitment before they know what the price will be. Therefore, we must reject that suggestion.[108]

2. *Special Access*

150. Under Special Access we grouped a variety of services and facilities that we decided to include in our system of access charges so that the tariffed access charges of all telephone companies include services and facilities that the divested BOCs will offer under access tariffs mandated by the MFJ. *See Access Charge Order* at para. 246. We also included segments of certain interstate or international private lines and interstate WATS lines. We contemplated that Special Access would encompass several subelements that should be priced separately to avoid

[107] *See, e.g.*, SBS Opposition at 14; USTS Petition at 3.

[108] It would not be unreasonable, however, for exchange carriers to include a reasonable notice requirement in their tariffs.

unlawful preferences,[109] but we did not attempt to establish such subelements. We indicated that we would address such issues in other Commission proceedings. *See id.* at para. 249. Ad Hoc and Western Union have asked us to reconsider that decision and to provide necessary guidelines for defining and pricing Special Access subelements in this *Order*.[110] As we explained in the *Access Charge Order:*

> This proceeding was not designed to develop criteria for designating such subelements or for apportioning costs among appropriate subelements and the record in this docket does not contain much information that would be useful for those purposes.

Id. These statements are as accurate now as they were when originally made. For this reason, we deny Western Union's and Ad Hoc's request.

151. In this reconsideration decision, we have established a system of surcharges to address the problems raised by interconnection by users of the closed ends of certain private lines and WATS lines. Since the Special Access category already includes certain private line and WATS charges, our rules governing this interconnected usage do so within the Special Access category. *See,* provisions of Section 69.115 *infra.* Similarly, while carriers (facilities-based or resale) normally are to obtain facilities which are interconnected with exchange service upon payment of carrier's carrier charges, para. 86 (and note thereto) *supra,* to the extent that there is resale of WATS at the closed end, we have placed such access by carriers also in the Special Access category to afford an appropriate transition for the charges to be paid for this form of access *Id.* We believe that with these clarifications of the purpose and scope of the Special Access category, and with the correlative establishment of surcharges, the concerns of Ad Hoc and Western Union are mitigated. Furthermore, charges associated with the remaining elements of the Special Access category, i.e., those other than surcharges addressed in Section 69.115, will be carefully scrutinized. We will examine the carrier's choices of subelements and cost data which will be provided to justify charges for these subelements to ensure compliance with the requirements of the Communications Act. The absence of detailed rules for the computation of Special Access subelements does not relieve exchange carriers from any of their statutory duties.

152. In its Opposition filing, IDCMA asks us to clarify that the designation of a charge as a carrier's carrier charge is not intended to foreclose an end user from ordering any transmission capability directly

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[109] For example, facilities for program transmission and WATS are included in this access element. The cost characteristics of such facilities are very different, however, and could not justify the same charges being assessed to users of these distinct services.

[110] *See* Ad Hoc Petition at 2–8; Petition for Reconsideration filed by Western Union ("Western Union Petition") at 12.

from an exchange carrier.[111] IDCMA's concern is that this designation might prevent an end user from "piecing together" its own link to an interexchange carrier's point of presence when facilities included in the Special Access element were involved. As previously noted in the discussion of the Dedicated Access Line element, we will permit either a carrier or a noncarrier to order any Special Access facility from the telephone company, provided that the result is that any carrier which does so does not thereby avoid the payment of carrier's carrier charges as clarified in this decision. What are not generally available to carriers under Special Access are private line facilities which might be resold to create MTS and WATS, and MTS/WATS-equivalent offerings; such facilities are available as Dedicated Transport facilities. The type of "piecing together" which IDCMA wishes us to clarify as permissible would appear to fall directly within the Special Access category as now clarified, i.e., as invoking the application of a surcharge to the extent that the facilities involved are those of a carrier.

IV. *Cost Allocation Rules*

153. The *Separations Manual*, incorporated by reference in Part 67 of our rules, defines the procedures for allocating a telephone company's investment in plant used to provide regulated services and related expenses between the interstate and intrastate jurisdictions. As the *Access Charge Order* makes clear, in this docket we are concerned only with the recovery of the interstate revenue requirement that results from applying the *Separation Manual's* procedures to that plant and expense. *See id.* at para. 259. In other words, we have taken the interstate revenue requirement determined under the *Manual* as given, and have focused in this docket only upon how a carrier should recover the share of that requirement properly attributable to its provision of interstate access services. Subparts D and E of Part 69 of our rules contain the rules adopted in the *Access Charge Orders* for apportioning investment and expense among the interexchange category and the access elements.

154. Recently, the Joint Board agreed to recommend that the Commission revise the *Separations Manual* to allocate to the interstate jurisdiction a share of some carriers' nontraffic sensitive costs that otherwise would have been allocated to the intrastate jurisdiction. Called the "High Cost Factor" (HCF) adjustment, this revision would allocate to the interstate services a proportionately higher share of a carrier's nontraffic sensitive costs when these costs exceeded 115% of the national average. In anticipation of favorable action on such a Joint Board recommendation and in recognition of the need for such a fund, the *Access Charge Order* allocated the interstate revenue requirement resulting from the HCF

[111] IDCMA Opposition at 5.

adjustment (the Universal Service Fund) to the Carrier Common Line element. *See* 47 CFR 69.501(a).

155. In their petitions for reconsideration in this docket, Alaska and RTC now urge the Commission to revise the HCF adjustment to enable high cost companies to recover a share of their traffic sensitive costs also.[112] At the other extreme, ADCU has argued that there should be no universal service fund.[113] ADCU also urges us to assert jurisdiction over all non-traffic sensitive plant.[114] This, however, is not the proper proceeding in which to raise these separation issues. Any revisions to the *Separations Manual* must be accomplished through a separations rulemaking proceeding. Moreover, any changes in jurisdictional separations must be considered in the first instance by the Joint Board established in CC Docket No. 80–286 or by another board. *See* 47 U.S.C. 410(c).

156. We do wish to note that the *Access Charge Order* emphasized that "we are totally committed to insure that [the access charge plan] does not lead to a disruption of universal service. That commitment is reflected in our decision to exclude Universal Service Fund costs from end user charges before and after the transition periods that are described in this *Report and Order*." *Id.* at para. 195. We remain committed to that goal.

157. ADCU asks us to clarify whether after divestiture the BOCs will continue to maintain local exchange facilities to the same extent that AT&T currently does. It is concerned that access charges will be based on the cost of the maintenance services offered before divestiture, but that the level of services will decline. The *Access Charge Order* makes no assumption about the level of facility maintenance a carrier will provide after its access charge tariff becomes effective. Under the rules, the cost of maintaining facilities associated with a specific access element (*e.g.*, Special Access) are allocated to that element and recovered through charges associated with that element.[115] If a telephone company decides to raise or lower the level of maintenance it provides for these facilities, there should be a corresponding rise or fall in the associated maintenance expense, which would flow through to the access charges assessed for the elements.

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[112] *See* Petition for Reconsideration filed by Alaska ("Alaska Petition") at 6–7; RTC Petition at 7.

[113] *See* ADCU Petition at 7.

[114] *See id.* at 11–12.

[115] As we and the telephone companies gain more experience with access tariffs we might consider requiring that maintenance costs be unbundled from other costs associated with these elements and recovered through separate charges. In the alternative, we might consider carriers' proposals to do so.

158. In addition to these more general concerns about the allocation of costs among the interexchange category and access elements, several technical adjustments (addressed below) have been suggested in petitions for reconsideration. Others will be required by changes we have made in the access charge plan. In this area, our short term goal has been and remains: rules that are simple to apply and that avoid gross misallocations of costs. As local exchange carriers and this Commission gain experience in administering access tariffs, we would expect that our apportionment rules would be replaced by more refined allocation rules that more accurately identify and assign costs to those causing the costs to be incurred. We believe, however, that such refinements must wait. In this *Order*, we shall adopt only those revisions to Subparts D and E of Part 69 that are necessary to avoid confusion or gross misallocation of costs or to conform to changes in the access charge plan made elsewhere in this Order.[116]

A. *Investment*

1. *Net Investment Apportionment*

159. Subpart D of the access charge rules contains the rules for apportioning net investment among the interexchange category and the access elements. AT&T advocates removal of the adjective "net" from this title and from all references to investment in Sections 69.301 (General) and 69.302 (Net Investment) of our rules in order to avoid misunderstandings.[117] GTE recommends adding a subsection to the latter rule that would apportion reserves attributable to investment in Accounts 100.1–100.4 and Account 122 among the access elements.[118] AT&T suggests that along with GTE's proposed addition to Section 69.302, a new rule for apportioning investment other than COE, Outside Plant (OSP) and Buildings be adopted. Currently § 69.302(b)(4) apportions this investment in the same proportions as total investment in Account 100.1 other than investment on COE, OSP and Buildings. The latter category of "other investment" includes investments like station apparatus that do not correspond to investment recorded in Accounts 100.2–100.4. AT&T proposes that the "other investment" in these subaccounts be allocated in

[116] Examples of the latter type of revision include deletion of references to the now eliminated Pay Telephone and Operator Assistance elements as well as reallocations of the investment and expense formerly apportioned to them among the remaining access elements and the interchange category.

[117] *See* AT&T Petition at A15.

[118] *See* GTE Petition at A–8. Under the Uniform system of Accounts, 47 CFR Part 31. Account 100.1 records Telephone Plant in Service while Accounts 100.2–100.4 record Telephone Plant Under Construction (100.2), Property Held for Future Telephone Use (100.3), and Telephone Plant Acquisition Adjustment (100.4) respectively. Account 122 records Materials and Supplies.

the same proportions as the associated investments recorded in Account 100.1.[119]

160. Of the three requested revisions, we find that only the AT&T proposal to alter the basis for allocating "other investment" recorded in Accounts 100.2–100.4 should be granted. It should be clear that the investment referred to in §§ 69.303–69.309 is net investment. The decision to apportion net investment rather than gross investment among the access elements and interexchange category does require identification of the depreciation reserves that are attributable to each element. Although it may not be possible specifically to identify such reserves from existing accounting records in all cases, we do not believe it would be desirable to prescribe a particular apportionment technique on the basis of the existing record. We shall, of course, expect carriers to perform such apportionments in a reasonable manner that is consistent with the assignment of plant and that is fully supported in cost support material filed with access tariffs. Accordingly, we deny all requested changes to the title of Subpart C, § 69.301 and § 69.302 other than AT&T's requested change of § 69.302(b)(4).

2. *Station Equipment and Customer Outside Plant*

161. In the *Access Charge Order* we had apportioned a share of the investment in station equipment, inside wiring and unused customer lines to the Dedicated Access element based upon "relative number of equivalent lines in use." See 47 CFR 69.303 (c)-(d), 69.304(e). Centel asserts that our rules assign a disproportionately large share of this investment to Dedicated Access and advocates deleting the subsections requiring this assignment.[120] The apportionment of which Centel complains, however, was intentionally made to "correct anomalies in the existing cost apportionment methods that impose an unfair burden upon MTS customers." *Access Charge Order* at para. 127. AT&T has also suggested that we simplify the rule for apportioning unused customer lines among access elements. Section 69.304(e) apportions this unvestment on the basis of equivalent lines in use. Correctly observing that the *Separations Manual* already allocates lines not in use in the same manner, AT&T has proposed that we replace the Section's more lengthy explanation of the meaning of "equivalent voice grade lines in use" by the statement that these costs should be apportioned on the basis of *Separations Manual* procedures for apportioning exchange outside plant. We are adopting this proposed revision.

[119] *See* Opposition to Petition for Reconsideration filed by AT&T ("AT&T Opposition") at A3.

[120] Centel Petition at 12–13.

162. Other parties have suggested revisions to §§ 69.303 and 69.304 of our rules to conform to their proposed redefinitions of the Special and Dedicated Access elements.[121] GTE also suggested that we revise these sections to make clearer how companies are to determine equivalent lines in use attributable to the Common Line element.[122] We are making the requested clarification. We are also revising apportionment rules to reflect our decision to combine the Dedicated Access Line and Special Access elements.

3. *Central Office Equipment*

163. Section 69.306 of our rules apportions the investment in each category of central office equipment (COE) among the interexchange category and the access elements. The *Separations Manual* categories are used for this purpose. Section 69.306(b) allocates investment in Category 1 COE (Manual Switchboards) among the Intercept, Information and Operator Assistance access elements. We have now eliminated the Operator Assistance element, and allocate the associated cost to the interchange category. *See* para. 163, *supra*. GTE has noted that Category 1 COE includes observing boards that observe not only operator services but also local and intertoll dial equipment. It asserts that the cost associated with these boards should therefore be apportioned among the interexchange category and the access elements associated with the observing function. We agree. Accordingly we are adopting the GTE proposal to allocate the costs of these serving boards among all the access elements and the interexchange category based upon the combined investment in COE Categories 1 through 6, excluding the investment in nontraffic sensitive Category 6 COE, which is not subject to observation, and in the service observing boards themselves.

164. GTE has also noted that some switches, while included in Category 2 COE (Tandem Switches) because they switch large amounts of local and extended area service calls, function also as toll switches. GTE recommends that to reflect these joint uses, we revise § 69.306(c) to allocate investment in Category 2 COE between Common Transport and the interexchange category. We find its point well taken and make the suggested change.

165. Presently we allocate investment in Category 4 COE (automatic message recording equipment) to the Billing and Collection element. Several parties properly note that this equipment also provides information for billing non-access services as well as access services to carriers and that, therefore, some share of the investment should be allocated to access elements other than Billing and Collection and to the interexchange

[121] *See, e.g.*, AT&T Petition at A16, GTE Petition at A–6, A–7.

[122] GTE Petition at A–7.

category.[123] While we agree that Category 4 COE must be reapportioned, we do not agree that any of their proposals will achieve a suitable result.

166. The *Separations Manual* distinguishes between two kinds of Category 4 COE: equipment used for the duration of a call and equipment used only momentarily to record information about the call. Equipment used for the duration of an interstate call consists primarily of clock timers used for WATS. Depending upon its assignment under the AT&T Reorganization, this investment should either be assigned to the interexchange category or to the Billing and Collection element. At the present time, telephone companies distinguish between Category 4 COE used only momentarily to record information about interstate message service, called Category 4B1, and Category 4 COE used only momentarily to record information about interstate switched private services' traffic, Category 4B2.[124] The AT&T Reorganization Plan would assign Category 4B2 COE to AT&T.[125] Accordingly, we shall also assign all investment in Category 4B2 to the interexchange category. Category 4B1 COE will continue to provide telephone companies with billing information that they can use for computing charges for carrier access elements with usage sensitive rate structures and for billing and collection services they offer to interexchange carriers. We find it unreasonable, however, to base the apportionment of this investment on the number of carrier access elements that have usage sensitive rates. The equipment records the information whether there are two or ten such elements. If a carrier offers billing and collection services we shall require it to apportion half its investment to the Billing and Collection element and half to the Local Switching element. We select the Local Switching element as the carrier access element to which we allocate some of this Category 4 COE because it has a usage sensitive rate structure and is an element to which all carriers offering switched services will subscribe. Within the Local Switching element, this investment shall be apportioned between LS1 and LS2 based upon the relative number of messages in each of these categories for which this equipment records billing information.

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[123] AT&T would apportion investment among the interexchange category and the Common Line, Local Switching, Common Transport, and Billing and Collection access elements in the same proportions as revenue accounting expense is allocated. AT&T Petition at A17–A18. Rochester would apportion the investment to LS2 because "[t]he investment is incurred as part of the cost of local dial switching capability of MTS-WATS and MTS-WATS-type services 'provided through a trunk side termination in a class 5 switch.' " (citation omitted) Rochester Petition at 21. United would allocate this investment among all access elements on the basis of revenue accounting expense attributable to each type of billing. United Petition at 11–12.

[124] Examples of such private service offerings are Enhanced Private Switched Communications Service (EPSCS) and Electronic Tandem Network Service (ETN).

[125] *See* Plan of Reorganization filed on December 16, 1982 in United States v. Western Electric Co., Civil Action No. 82-0192 (D.D.C.) at 34, 37.

167. Both AT&T and GTE assert that we should revise the rule for apportioning Category 5 COE (Other Toll Dial Switching Equipment). Presently Category 5 COE is apportioned between the Operator Assistance element and the interexchange category. See 47 CFR 69.306(f). They recommend that we reallocate this investment among Common Transport, Local Switching and the interexchange category.[126] We believe that the GTE proposal with one slight modification results in an appropriate apportionment of this plant. GTE has recommended assigning the portion of Category 5 COE located in end offices to Local Switching because it consists primarily of digit absorption equipment needed to permit uniform nationwide dialing for long distance calls when only four or five digits are needed for local calls. Because presently and for some time to come only MTS and WATS will benefit from this investment, we are assigning this investment to the LS2 category. We are, however, adopting the GTE proposal for allocating the remainder of Category 5 COE between the Common Transport element and the interexchange category.

4. *Buildings*

168. The *Access Charge Order* required that Category 1C space investment (Dial Switching) be allocated among the interexchange category and the Line Termination, Local Switching, Operator Assistance, Common Transport and Special Access elements in the same proportions as combined investment in COE categories, 2, 3, 5, 6 and 7. *See* 47 CFR 69.307(d). United and GTE suggest that we modify the rules to reflect the fact that Category 1C space is also used for Category 4 COE and a share of this investment should be allocated to the Billing and Collection element.[127] We agree that the rules should be revised to recognize that Category 4 COE also uses this space and are assigning a share of this investment to the Billing and Collection element.[128]

169. Under § 69.307(e), 47 CFR 307(e), investment in Category 2 space (Operator Quarters) and Category 3 space (General Traffic Supervision) is to be apportioned among the interexchange category and the Intercept, Information and Operator Assistance elements in the same proportions as Category 1 COE. United asserts that this apportionment does not properly reflect the use made of this space. United recommends that Category 2 space be apportioned in the same proportions as Operator Wages (Account 624) and Category 3 space be apportioned in the same proportion

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[126] *See*, GTE Petition at A-2; AT&T Opposition at A7.

[127] *See* United Petition at 13; GTE Petition at A-4, A-5. United and GTE proposed to apportion this investment on the basis of combined investment in COE categories 2 through 7. AT&T opposed these proposals because they would be inconsistent with the change AT&T had proposed for the apportionment of Category 4 COE. *See* AT&T Opposition at A8. We have already rejected that AT&T proposal. *See* para. 165, *supra*.

[128] The modification we make is basically the one United and GTE proposed.

as General Traffic Supervision Expense (Account 621).[129] AT&T and GTE concur, but recommend that additional access elements receive a share of the investment.[130] On reconsideration we conclude that the change to subsection 609.307(e) proposed by United, modified to reflect the elimination of the Operator Assistance element, will lead to a more reasonable apportionment among specified access elements and the interexchange category.

170. Category 7 space investment (Garages and Storerooms) would under the *Access Charge Order* be apportioned among the interexchange category and the Dedicated Access Line, Limited Pay Telephone, Common Line, Dedicated Transport, Common Transport and Special Access elements based upon combined OSP investment. *See* 47 CFR 69.307(i). GTE suggests that we revise the rules to apportion this investment among access elements based on the allocation formula used in the separations process.[131] Because it will more accurately reflect the use to which this space is put, we are adopting the GTE proposal.

B. *Expenses*

1. *Traffic Expenses*

171. Section 69.404 of our rules apportions traffic expense among the interexchange category and the Intercept, Information and Operator Assistance elements in the same proportions as COE 1 investment. Both AT&T and GTE assert that this results in a misallocation of costs to rate elements because the traffic expenses accounts include subaccounts for network administration and supervision.[132] GTE adds that some telephone companies have study areas with traffic expenses but no Category 1 COE investment. We agree that the flaws highlighted in the telephone companies' comments must be corrected. United, AT&T and GTE have proposed revision to the rule either of which should overcome the major problems with the existing rule.[133] GTE, however, proposes to disaggre-

[129] United Petition at 14.

[130] *See*, AT&T Opposition at A10; Reply to Oppositions by the GTE Telephone Companies ("GTE Reply"), Attachment 2 and 5. AT&T fails to identify the additional access elements to which it would apportion a share of the investment in Category 2 or Category 3 space. If at some later date the telephone companies would be prepared to identify additional access elements besides Intercept and Information to which this investment should be apportioned, we would then consider modifying the rule.

[131] *See* GTE Petition at A–13. The *Separations Manual* apportions the cost of this space among the operations in proportion to the combined investment in station equipment, outside plant and materials and supplies. *See Separations Manual* at para. 22.237.

[132] *See* AT&T Petition at A20; GTE Petition at A–9.

[133] *See* Opposition to Petitions for Reconsideration of United Telephone System, Inc. ("United Opposition") at 4: Reply of the Bell System Operating Companies and the American Telephone and Telegraph Company to Oppositions to Petition for Reconsideration ("AT&T Reply") at A2: GTE Petition at A–9, A–10.

gate traffic expenses substantially more than do United and AT&T. We are adopting the more simple United and AT&T proposal at this time. While less refined than GTE's proposal, it should cure the more serious cost misallocations of the existing rule and assure that companies can recover appropriately their traffic expenses even if they have no Category 1 COE.

2. *Commercial Expenses*

172. Section 69.405 apportions commercial expense among the interexchange category and the access elements. That section assigns the sales and advertising expenses to the interexchange category. The *Access Charge Order* (para. 294) said that these "activities should be excluded from access charges because there is no reason to anticipate that the local exchange carriers will have any reason to advertise exchange access services."

173. AT&T notes that the separations apportionment is based upon relative revenues. This could result in a substantial interstate apportionment that is not matched by interexchange category revenues from interstate operations. In these circumstances the interstate expense should be apportioned among all categories and elements until the separations formula is reviewed. We have concluded that the Section 309 "other investment" ratio should be used for this purpose.[134]

174. AT&T, GTE and United note that the Local Commercial expenses account (Account 645) includes expenses directly attributable to pay telephone collections, which should be directly assigned, and, with the advent of access charges, will include expenses associated not only with billing and collection services, but also with access facilities provided end users and interexchange carriers.[135] Presently Local Commercial expenses would be assigned to the Billing and Collection element. *See* 47 CFR 69.405(b). To avoid a gross misallocation of costs among access elements, this rule must be revised. The carriers recommend directly assigning expenses attributable to pay-station collections to the Pay Telephone element and apportioning the remainder among the elements and the interexchange category based upon their relative share of Revenue Accounting Expenses. We accept their suggestion, assigning the portion of the expenses that would have been assigned to the Pay Telephone element to the Carrier Common Line element. *See* para. 58 *supra*.

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[134] AT&T suggested a formula based upon various expenses attributed to each element. The expenses listed do not appear to have any particular relationship to sales and advertising expense. AT&T also states that some of these expenses can be directly assigned, but it appears doubtful that any sales or advertising expense could be directly assigned to any access element on the basis of existing records.

[135] *See* AT&T Petition at A21-22; GTE Petition at A-5; United Petition at 15-16.

175. Subsection 69.405(e) contains the rules for apportioning the remaining commercial expenses. Both AT&T and United suggest that the rules be changed to identify the accounts recording these "other commercial expenses" and to conform to their suggested changes for other subsections of § 69.405.[136] We are incorporating the minor changes to this subsection proposed by both AT&T and United.

3. *Revenue Accounting Expense*

176. Rule 69.406 apportions revenue accounting expenses. Expenses attributable to end user billings are apportioned to NTS elements, expenses attributable to carrier's carrier billings to traffic sensitive elements, and all other revenue accounting expenses to the Billing and Collection element. AT&T and United have suggested that we also assign revenue expense attributable to interexchange billing to the interexchange category. We are not accepting that suggestion because the assignment appears to be unnecessary. The billing of an interexchange service to an end user is a Billing and Collection service for an interexchange carrier.

4. *Other Expenses*

177. GTE, with AT&T's support, has proposed that we revise §§ 69.402 (Current taxes) and 69.407 (General office expenses) to rely more heavily upon separations methods to apportion these expenses.[137] Those petitioners have not demonstrated that use of the separations methods would produce better results. Therefore, we are not adopting their suggestions.

V. *The Exchange Carrier Association*

A. *Establishment of the Association*

178. Section 69.601 of our rules defines association membership based upon participation in the distribution of Carrier Common Line revenues collected by the association. Rochester suggests that this definition excludes from association membership "those companies, such as [Rochester], that will contribute to, but eventually collect nothing from the pool."[138] Rochester requests that we revise the rule to clarify that any carrier required to contribute to the pool is deemed a member of the association. We deny Rochester's request. As an exchange carrier, Rochester will never contribute revenues to the Carrier Common Line revenue pool; interexchange carriers will pay such monies to the association, which, in turn will distribute the money among exchange carriers in accordance with §§ 69.605–69.608 of our rules. When Rochester reaches

[136] *See* AT&T Petition at A22; United Petition at 16.

[137] *See* GTE Petition at A–13; A–15; AT&T Opposition at All, A16–17.

[138] Rochester Petition at 24.

the point at which it no longer needs to participate in the Carrier Common Line element to assure recovery of all its common line revenue requirement,[139] we would expect that it would withdraw from the association and no longer concur in the association tariff charges for the Carrier Common Line element.

179. Under the access charge plan, membership in the association would be limited to telephone companies participating in the access charge revenue pools and the association's governing board would be composed exclusively of the representatives from such companies. While acknowledging that the board's membership should fairly represent the different classes of carriers that we expected would join the association, the *Access Charge Order* defined neither the size nor the composition of the board. We concluded that this must await identification of the telephone companies that would join the voluntary association access elements at least for the first year. We indicated that once this information became available we would issue a rule prescribing the board's structure without seeking additional comment. In its petition for reconsideration REA asked us to reconsider our decision to proceed with the rule without additional public comment.[140] We have already concluded, however, that we had sought and received sufficient comment on the structure of the association's governing board in response to the *Fourth Supplemental Notice* to proceed with the rulemaking and have issued the rule defining the board's structure. *See Supplemental Order* in this docket, FCC 83–252, released May 31, 1983. The REA request is accordingly denied.

180. MCI has urged us to eliminate the association from our access charge plan. It asserts that our requiring telephone companies to participate in the association Carrier Common Line tariff to recover a share of their common line costs is unlawfully coercive, raises what it terms "profound antitrust problems" and constitutes an unlawful delegation of our authority to a private entity.[141] These arguments were considered and rejected in the *Access Charge Order, see id.* at paras. 309, 333–342, and n. 109. We find them no more convincing now. On reconsideration MCI also asserts that this "delegation of authority" is unconstitutional because it gives an association whose exchange carrier members have a "substantial pecuniary interest in the outcome of the dispute as to proper access charges" control over the amount of access

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[139] We would not anticipate this occurring any earlier than 1992, the year by which Rochester's capitalized investment in inside wiring would be completely amortized.

[140] REA Petition at 9.

[141] MCI Petition at 23. MCI's challenge to the legality of our requiring exchange carriers participating in extended area service agreements to file joint tariffs or to concur in the association tariff for traffic sensitive charges is rendered moot by our revision of the rules governing such carriers. See paras. 188–92 *infra.*

charges that MCI will pay all exchange carriers.[142] MCI cites *Gibson v. Berryhill,* 411 U.S. 564 (1973), as legal support for this conclusion. In *Gibson v. Berryhill* the Supreme Court held that a state board composed solely of self-employed optometrists could not constitutionally adjudicate whether the license of optometrists employed by an optical company should be revoked because the board members had a substantial pecuniary interest in the outcome of that dispute. 411 U.S. at 579. In *Gibson,* the board members along with other private practitioners would have fallen heir to the optical corporation's business if the latter had to suspend its operations because its employees' licenses had been revoked. MCI's argument is flawed because it assumes that there has been some delegation of Commission authority to the association. MCI itself fails to identify any delegated power and in fact there has been no such delegation. See *Access Charge Order* at para. 97. The association will not be performing any adjudicatory or other governmental functions; it will be preparing tariffs as an agent for the carriers that offer the tariffed services. The association tariffs will be reviewed by this Commission under the same panoply of procedural and substantive rules that apply to a tariff filed by an individual carrier. As we indicated in the *Access Charge Order,* the Communications Act and our rules provide safeguards adequate to protect the interests of not only interexchange carriers but also state commissions and consumers in the fair and evenhanded implementation of the plan we have adopted. *See id.* at para. 345.

181. We have already discussed at length in the *Access Charge Order* the crucial role that the association and the Carrier Common Line element will play in our access charge plan. *See id.* at paras. 314–316, 339–42. MCI has presented nothing that would cause us to revise that conclusion. Interexchange carriers and others do, however, have a legitimate interest in obtaining as much information as possible about the development of tariffs prior to the annual filing and it may be desirable to create mechanisms to enable the association directors to consider views of persons other than exchange carriers at an early date. We shall consider the feasibility and desirability of adopting some rules on this subject in a future rulemaking proceeding.

B. *Billing and Collection of Carrier Common Line Usage Charges*

182. The access charge rules we adopted in December established two Carrier Common Line charges—a lump sum premium charge that will be collected from interexchange carriers that provide MTS and WATS and a charge that will be collected on a usage basis from all interexchange carriers that provide services that use the common line. Section 69.604 provided that the exchange carrier association would bill and collect these

[142] MCI Petition at 24.

Carrier Common Line charges and the telephone companies would bill and collect all other end user and carrier's carrier charges.

183. The AT&T, GTE, and USITA petitions have urged that we revise this provision to limit association billing to the premium charge. AT&T said that the billing of Universal Service Fund charges should "possibly" be included in the association's functions. These petitioners state that association billing of usage charges will require the creation of a duplicative billing system and will result in considerable administrative expense that should be avoided. These petitioners did not provide any estimate of the administrative expenses that could be avoided by requiring the telephone companies to bill and collect the usage portion of the Carrier Common Line charges. This proposal did not attract any opposition or support in the subsequent filings of other persons.

184. We have decided that this suggestion should not be adopted. Association administration of revenue pools is likely to function more smoothly if most telephone companies are net recipients of pool distributions. This result can be achieved by flowing money through the association for as long as the revenue pooling continues. In view of our decision to eliminate a separate premium access element, association billing of the remaining carrier usage charge is necessary to preserve a fund to administer.

C. *Billing and Collection Restrictions*

185. The access charge rules impose several restrictions upon a carrier's right to file separate tariffs for voluntary association rate elements. Several petitioners have requested that some of these restrictions be modified.

186. Under the access charge plan, telephone companies choosing to offer billing and collection services or billing information services to interexchange carriers will recover the costs of providing these services through the Billing and Collection access elements. In contrast with the rate prescription rules for the other traffic sensitive elements, the rule governing charges for Billing and Collection would permit carriers to recover more than the prescribed rate of return on investment allocated to this element. *See* 47 CFR 69.114.

187. Several petitioners have requested that we amend the rules to authorize an exchange carrier to file its own charges for the Billing and Collection element and still to concur in the association tariff's charges for the remainder of the traffic sensitive elements.[143] The rationale for requiring that a carrier either concur in the association tariff's charges for all traffic sensitive elements or file its own charges for all these elements was that "many of these elements are closely interrelated and a

[143] *See. e.g.*, AT&T Petition at 33; RTC Petition at 20; USITA Petition at 4.

combination of separate and common tariffs for the same carrier could produce anomalous results that are inconsistent with the goals and requirements of the Communications Act." *Access Charge Order* at para. 320. Our disparate treatment of the rate structure for the Billing and Collection element and its exclusion from the group of access elements for which the association would administer revenue pools implicitly recognize that the Billing and Collection element is not among these closely interrelated elements. On reconsideration we conclude that the carriers' request can be granted without endangering the concerns that prompted us initially to include the Billing and Collection element in the traffic sensitive block of the association tariff. For this reason we are amending § 69.3(e)(3) of our rules to permit an exchange carrier to file its own charges for Billing and Collection and to participate in the association tariff for the remaining traffic sensitive access elements.

D. *Extended Area Service*

188. While the access charge rules require that all exchange carriers participate in the association's Carrier Common Line charges in order to recover the costs apportioned to that element, the rules do permit most carriers to join or refrain from joining the association tariffs and revenue pools for other elements.[144] Most carriers who elect not to join in these "voluntary" tariffs may either file an individual tariff for the access elements involved or join in a common tariff with other exchange carriers who have also chosen not to concur in the association tariff. The *Access Charge Order* has restricted the freedom of carriers participating in extended area service arrangements to "opt out" of the association tariff's charges for traffic sensitive elements. It has required that a carrier's traffic sensitive charges apply to the entire extended area, *see* 47 CFR 69.3(e)(9), and has precluded a carrier from imposing within the extended area a charge for any traffic sensitive access element (other than the association charge) without the concurrence of all the telephone companies that serve the extended area. *See* 47 CFR 69.3(e)(9). This latter restriction was based on the assumption that service to an extended area should be viewed as joint access because traditionally access has been offered to the entire extended area for services such as FX, CCSA and ENFIA access for MTS/WATS equivalent services.

[144] The rules do impose some restrictions on a carrier's decision to join in these "voluntary" tariffs. The *Access Charge Order* separated the access elements other than Carrier Common Line into two groups based upon whether the associated charges were to be assessed on end users or on interexchange carriers (traffic sensitive charges). A carrier choosing to concur in association tariff charges for one element in either of these groups had to concur in the association tariff's charges for all the other elements in the group. *See* Access Charge Order at paras. 318, 320; 47 CFR 69.3(e)(2)–(3).

189. In their petitions for reconsideration telephone companies have asserted that the extended area rules unnecessarily restrict carriers' flexibility.[145] AT&T also has focused upon the interaction between the extended area rules and § 69.3(e)(7), which prohibits a telephone company that files its own access tariffs from filing charges that are disaggregated or deaveraged within its study area. It concludes that a telephone company that has entered into several extended area arrangements with different telephone companies in a particular state might be required to concur in the association charges for its entire study area if it could not reach agreement with every one of these other companies. Other companies that have established extended area arrangements with it could also be precluded from establishing separate charges even if they reached an agreement with the first company if the first company were required to use association charges in another extended area within the same state.

190. There seem to be essentially two sources of potential problems that may arise from joint provision of access services in an extended area. The first is the need to divide access service revenues among the telephone companies providing these services in the extended area. The second is an exchange carrier's inability to recognize when it is actually providing interstate access services. The restrictions imposed by the *Access Charge Order* on access tariffs for extended areas respond only to the first problem and, as the petitioners have underscored, can severely hamper a telephone company's ability to develop cost-based rates for its access services. For these reasons we are eliminating the requirement that carriers participating in extended area arrangements either file a joint tariff or concur in the association tariff's charges for traffic sensitive access elements. We are, however, imposing some requirements to solve the problems we perceive.

191. Transport and switching of interstate traffic originating or terminating in an extended area will still be deemed access services.[146] If exchange carriers providing access services in an extended area cannot agree on a formula for the division of access revenues generated from jointly provided access services, each may simply bill and collect separately for the access services that it provides. Separate charges are clearly feasible for services such as MTS that have traditionally been provided through direct connections with a Class 5 switch. The telephone companies apparently have ignored extended area arrangements in computing

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[145] *See* AT&T Petition at 13–17; Centel Petition at 3; CTE Petition at 7–10; Rochester Petition at 6–9; RTC Petition at 19.

[146] Conceptually, transit through the exchange in which the FX line terminates could be described as interexchange if the call does not originate or terminate there, but it would be using facilities that are local exchange access facilities for every other purpose.

MTS, WATS and most private line settlements. The extended area problem is largely confined to services that use line side connections. If an FX line terminates in a particular Class 5 switch in an extended area, it may be difficult to determine whether a call terminated or originated in a telephone that is served by that switch or a telephone that is served by a Class 5 switch in the adjacent exchange. Separate traffic sensitive charges for interstate services using line side connections become feasible if some formula is devised for attributing originations and terminations to each exchange in the extended area even if the actual path of some calls cannot be traced. We have decided that the following formula should be used in the absence of an agreed formula.

192. When one or more carriers participating in an extended area arrangement do not have an agreed formula for the division of access revenues for traffic sensitive elements and do not both participate in the exchange carrier association tariffs for recovery of traffic sensitive costs, we shall require that each carrier in the arrangement cooperate in the tracing of paths of interstate calls whenever such paths can be traced. For those interstate services offered by an interexchange carrier through line side interconnections with a class 5 switch located in an extended area in which the path cannot be traced, it seems logical to assume that the associated originations and terminations are proportional to the number of main stations in the area. Recognizing that it may not be possible to identify main stations in the future, however, we propose that access lines be used as a surrogate for main stations when such identification cannot be made.[147] Then for purposes of computing charges for access services provided in extended areas in which at least one telephone company is not concurring in the association tariff, originations and terminations of interstate services through line side interconnections shall be apportioned among end offices in the extended area based on the relative number of main stations connected to or, if that number cannot be determined, the relative number of access lines terminating at each of these end offices.

E. *Average Schedule Status*

193. Under the access charge plan, a telephone company is treated as an average schedule company only if all of its affiliates are also average schedule companies and it has concurred in the association's tariffs for all access elements. *See* 47 CFR 69.605(c). Several parties have asked us to reconsider the criteria for defining an average schedule company. All agreed that these conditions would require many independents to abandon schedules. RTC asserts that a company's status as an average schedule

[147] Party lines and Centrex-CO lines should, of course, be counted as separate lines for this purpose.

company should not turn on the status of its affiliates. RTC, Centel and REA also find the compulsory pooling requirement too restrictive.

194. We incorporated a modified version of the existing average schedule arrangement into the access charge rules in order to avoid imposing the burden of developing cost information upon companies that may be too small to meet that burden. We assumed that all such companies are presently participating in average schedule payments. Some companies that are large enough to compile cost information undoubtedly also participate in average schedule settlements. We could not reasonably defer the implementation of access charges to identify such companies, but we *did* infer that companies or affiliated groups of companies that are partly in and partly out of average schedule settlements are not too small to perform cost studies. We accordingly excluded such companies from the average schedule definition for purposes of access charge computations and distributions.

195. The definition we have adopted may deprive some companies of benefits they derived from the prior contractual arrangements, but those companies have not presented any reason for concluding that they should be entitled to those benefits. No company has a right under the Communications Act to recover costs from interstate ratepayers that exceed the interstate costs that would be computed under the applicable *Separations Manual* formula. Averaging is justified as a means of approximating those costs. We have, however, decided to suspend for a period of two years, the requirement that all affiliates of a cost company be compensated on the basis of actual costs. It may be difficult for such affiliates that are presently compensated as average schedule companies to develop cost data. Some rate adjustments may also be required to reflect changes in separations methods. Therefore, a two-year waiver is warranted to avoid undue disruption.

196. Some petitioners also note that the existing average schedule system gives a company the option of participating in an average schedule for only a portion of its costs and suggest that the access charge rules be modified to include such an option. The average schedules do not appear to correspond with access elements we have defined and accordingly could not be easily adapted even if we found that such a system would be desirable. We conclude that, at least for the initial access charges, a company should either be classified as average schedule for all access elements except Billing and Collection or not be classified as average schedule for any of them. Companies that presently participate in average schedule settlements for part of the access compensation will, however, be permitted to elect between average schedule and cost status if they would not otherwise be defined as cost companies.

F. *Repolling*

197. In view of the modifications that we have made in the access elements, a few carriers who have elected to join or to refrain from joining association tariffs may wish to reconsider their choices. In particular, companies that have elected to join association traffic sensitive elements, must be afforded an opportunity to elect to file tariffs for a Billing and Collection element that differs from association charges for that element.

198. The redefined end user elements do not afford the same range of choices to carriers that file their own tariffs. Some companies that elected to file non-association rates for the end user elements may wish to join in an association tariff under the present circumstances. Therefore, those companies should be repolled. We have also been advised that at least one average schedule company that did not elect to join in association charges did not realize that it must join the association charges in order to retain average schedule status. Others may have acted upon the same misconception. Therefore, every average schedule company that elected to file non-association charges should be repolled.

199. We expect that AT&T will perform the necessary repolling as soon as possible and report the results to the Chief of the Common Carrier Bureau. At the same time it should obtain from each exchange carrier the projected average number of private lines, closed-end WATS lines and any other lines in that carrier's study area that will be subject to the Special Access surcharge in 1984.

VI. *Other Issues*

A. *State and Federal Jurisdiction*

200. In the *Access Charge Order* we rejected suggestions that we delegate to state commissions responsibility for developing interstate access charges. *See id.* at para. 69. Illinois now asks us to reconsider that decision. It notes that delegation would result in a carrier's having uniform carrier's carrier access charges for both interstate and intrastate access services. The same result could, of course, be achieved if a state commission adopted interstate rates for intrastate access charges. Illinois makes clear, however, that it finds delegation preferable.

201. In the *Access Charge Order* we identified the four goals in this phase of this proceeding:

(1) preservation of universal service;

(2) elimination of discrimination;

(3) promotion of network efficiency; and

(4) prevention of uneconomic bypass.

Id. at para. 26. We believe that our access charge plan, as modified by the changes we make today, strikes an optimal balance among these

potentially conflicting goals. The comments of illinois and other state commissions filed in this reconsideration proceeding make clear that, given the authority to do so, different states would structure interstate access charges to achieve different results. For example, Illinois would use such delegated authority to move quickly to cost-based rates, deaveraging costs within study areas and eliminating the Carrier Common Line charge for interstate traffic originating or terminating in Illinois. Thus Illinois would seek to withdraw from participation in this Commission's efforts to preserve our nationwide telephone system through the Universal Service Fund. AT the other extreme, other state commissions indicate that given the power to develop interstate access rates, they would seek even more extensive cost averaging and lower fixed charges.[148] Thus, these commissions would preserve low fixed charges at the expense of economic efficiency, even if a byproduct of their action is uneconomic bypass of certain telephone companies' local networks. These comments vividly illustrate why delegation would not promote nationwide service objectives, nor produce uniform results, and is therefore undesirable.

202. This Commission has the responsibility to balance conflicting goals to the Communications Act in order to achieve results that will promote all of those goals to the maximum extent possible. We must exercise our own best judgment in striking the proper balance. The Act does not permit us to abdicate that responsibility to others.[149] Finally, our access charge plan is not, as the Maryland People's Counsel suggests, an intrusion into state ratemaking authority.[150] Our access charge plan addresses solely interstate services, and not intrastate services over which the states exercise authority.

B. *Notices*

203. Several petitioners contend that we failed to give adequate notice of our intent to adopt an access charge plan that substantially alters the manner in which its customers compensate an exchange carrier for its costs of providing interstate access.

[148] *See* Comments of the Vermont Public Service Board and "Vermont Department of Public Service on Petitions for Reconsideration (Vermont Comments") at 6–7; Michigan Comments at 1–8.

[149] In its petition, Rock Hill Telephone Company asks us to clarify which commission has jurisdiction over calls between Rock Hill, South Carolina and points in North Carolina. In the absence of an appropriate extended area service agreements between Rock Hill and North Carolina telephone companies, such traffic is clearly within our jurisdiction and subject to the rules we have established for access charges for all interstate or foreign telecommunications. Rock Hill should recover its costs of originating and terminating this traffic through access charges under a tariff filed with this Commission.

[150] *See* Petition for Reconsideration of the Maryland People's Counsel at 5.

204. Some petitioners contend that enhanced services should not be subjected to access charges because the providers and users of those services did not receive sufficient notice that this proceeding might affect the amounts that they pay for access.[151] We do not find that contention persuasive. The *Initial Notice* in this docket advised all persons that we expected to examine all forms of access compensation for interstate and foreign telecommunications in a comprehensive manner. None of the subsequent *Notices* expressed any intention to narrow the scope of this proceeding. Moreover, the local business rate, or B–1, charges which have been paid for enhanced service access in the past merely represent another application of the method the telephone industry has traditionally used to obtain access compensation from FX customers. The *Second Supplemental Notice* clearly indicated that we viewed the relationship among FX, ENFIA, MTS, and WATS access compensation as a central problem that must be resolved in order to establish access compensation for MTS/WATS equivalent services. The use of B–1 rates for enhanced service access is part of the same generic problem, since enhanced service providers use local exchange facilities in the same or similar manner as do these services. Therefore, vendors of enhanced services should have known that any final decision in the access charge phase of this proceeding would be likely to affect the charges they pay for access.

205. Moreover, the MFJ treats information access for information services, and exchange access for interexchange carrier services in the same manner. Therefore, persons who provide or use services that are described as "information services" in the MFJ should have known that they would pay an BOC carrier access charges in the absence of Commission action which required different treatment for "information access." The *Fourth Supplemental Notice* invited all interested persons to comment upon the desirability of defining the scope of access service to correspond with the MFJ definition, 90 FCC 2d at 153. That *Notice* alone should have been sufficient to notify the petitioners that the final rules in this proceeding would be likely to have some effect upon the price of enhanced service access.

206. Our decision to impose surcharges in lieu of carrier's carrier charges on private lines used by enhanced service providers renders that notice question moot in any event. The *Second* and *Fourth Supplemental Notices* contained considerable discussion of alternatives that would affect private line rates.

207. In his petition for reconsideration, Arthur W. Brothers asserts that independent telephone companies were also denied notice and an opportunity to comment on the financial impact upon them of the access charge plan. This assertion is incorrect. In the *Fourth Supplemental*

[151] *See, e.g.*, Telenet Petition at 1–4, 6–10; Tymnet Petition at 11–13.

Notice we discussed alternative plans for implementing access charges. We not only recognized that our decision in this proceeding "could have a significant impact on a substantial number of small independent telephone companies," 90 FCC 2d at 154, but also stated explicitly:

> It appears that these alternative plans could have differing effects on small telephone companies, although the extent of the difference is not entirely clear at this point. We specifically request small independent telephone companies, and the organizations representing them, to address the implications of these alternatives for their operations.

The regulatory proposals discussed in this item would supersede existing mechanisms such as ENFIA, division of revenues and settlements through which local telephone companies are compensated for the use of their facilities in the origination and termination of interstate communications.

Id. at 155.

208. The Independent Alliance claims that we gave no notice of our intent to impose access charges on end users.[152] The Maryland People's Counsel adds that because the proposal we adopted the *Access Charge Order* was not one of the options presented in the *Fourth Supplemental Notice*, we must permit interested parties to evaluate and to comment upon the plan adopted.[153] In the *Fourth Supplemental Notice*, however, we expressed our anticipation that under the access charge plan we would adopt:

> exchange carriers will be compensated for the traffic sensitive costs actually imposed by the interexchange carriers. . . . Non-traffic sensitive plant need not be allocated to these interexchange carriers. Rather, exchange carriers may be able to bill their customers directly to this portion of access.

Id. at 152. We did not adopt any of the alternatives for structuring these end user charges that we discussed in the *Fourth Supplemental Notice.* As we explained in the *Access Charge Order:*

> We have decided that none of the access charge options presented in our *Fourth Supplemental Notice* is entirely satisfactory. The access charge plan that we are adopting herein is more complex, and we believe it fair to say more sophisticated, than any of these options. Our new plan, however, incorporates elements of the options in the *Fourth Supplemental Notice* and reflects the ideas and suggestions expressed in many of the comments.

Id. at para. 104. Thus the end result represented an effort to accommodate concerns expressed in comments filed in response to the *Fourth Supplemental Notice. See Access Charge Order* at para. 105–123. Interested parties have had the opportunity to voice their objections to the decisions reached in the *Access Charge Order* and many, in fact, have taken the opportunity to do so in this reconsideration proceeding. We are today

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[152] Independent Alliance Petition at 3–7.

[153] Maryland People's Counsel Petition at 4.

modifying the access charge plan to accommodate some of the concerns they have expressed. Thus we have fully discharged the obligations imposed upon us by the notice requirements of the Administrative Procedure Act, 5 U.S.C. 553(b), and the Constitution. *See CCIA* v. *FCC*, 693 F.2d 198, 217–18 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3826 (U.S. May 16, 1983) (Nos. 82–1331 and 82–1332).

C. *Docket 20099*

209. In the *Access Charge Order* we noted that some facilities to be covered by access charges were the subject of the Settlement Agreement between the Bell System companies and the OCCs that we accepted as a disposition of Docket 20099. *See Exchange Network Facilities for Interstate Services*, CC Docket No. 78–371, 71 FCC 2d 440, 453–54 (1979); *Facilities for Use by Other Common Carriers*, Docket No. 20099, 52 FCC 2d 727 (1975). Under the terms of that agreement, the BOCs could revise the rates for certain access facilities only if the revised rates were cost supported and the other carrier parties received notice of the proposed changes at least six months before their effective date. In the *Access Charge Order* we observed that if applied to access tariffs this notice requirement could prevent their timely implementation. Finding such delay contrary to the public interest, we abrogated "any contractual notice requirement of the Settlement Agreement that might be applicable." *Access Charge Order* at n. 90.

210. Several OCCs have asked us to reconsider our decision to abrogate the notice requirement, citing *MCI Telecommunications Corp.* v. *FCC*, 665 F.2d 1300 (D.C. Cir. 1981). In *MCI*, the court held that the FCC could not permit a carrier, through tariff revisions, unilaterally to abrogate a preexisting contract. *See, Federal Power Comm'n* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Under the *Sierra-Mobile* line of cases, the FCC may abrogate a carrier-carrier contract only under certain circumstances. Contract rates may be abrogated if the agency finds the rates to be "unjust, unreasonable, unduly discriminatory, or preferential." *MCI, supra* 665 F.2d at 1303, quoting *Sierra, supra*, 350 U.S. at 355, or if the contract rates were such as to "adversely affect the public interest." *Sierra*, 350 U.S. at 355.

211. The basis for our decision in the Access Charge Order to abrogate the notice requirement was that we believed it essential to the effective implementation of the access charge plan to have all the new rates become effective simultaneously on January 1, 1984. Upon reexamination, we now conclude that no substantial public interest reasons are before us to justify abrogation of the six month notice requirements. Further, we cannot find on this record that the requirement would impose

an excessive burden on other ratepayers. If the tariffs containing new rates for facilities covered by the Settlement Agreement are filed on October 3, 1983, those rates may be made effective on April 3, 1984 (under the six month notice requirement), only three months after they would have been effective had we abrogated the notice requirement. This delay is insubstantial and in our judgment should not unduly impair our ability to implement the rest of the access charge plan on a timely basis, effective January 1, 1984. For these reasons, we shall not abrogate the six month notice requirement of the Docket 20099 Settlement Agreement.[154]

VII. *Ordering Clauses*

212. Accordingly, it is ordered, That pursuant to 47 U.S.C. 154 (i) and (j), 201, 202, 203, 205, 218 and 405 and 5 U.S.C. 553, that the *Third Report and Order* adopted in this proceeding is modified to the extent set forth in this *Memorandum Opinion and Order.*

213. It is further ordered, That petitions for reconsideration or clarification are granted to the extent set forth herein, and are otherwise denied.

214. It is further ordered, That the Motions to Strike filed by Satellite Business Systems are denied.

215. It is further ordered, That the Motions for Waiver of Page Limitation filed by the Rural Telephone Coalition and the Southern Pacific Communications Company are granted.

216. It is further ordered, That the Motions to Accept Late-Filed Reply filed by the Association of Data Processing Service Organizations, Inc. and the National Data Corporation are granted.

217. It is further ordered, That Part 69 of the Communication's Rules is amended as set forth in Appendix A, effective on the day following their publication in the **Federal Register**. We find good cause for requiring an effective date earlier than thirty days following publication in the **Federal Register**. This good cause arises from the need for telephone companies to file tariffs on October 3, 1983 that are based on the access charge rules as revised by this *Memorandum Opinion and Order.*

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[154] In a July 13, 1983 motion, the Western Union Telegraph Company requested the Commission to grant a stay pending judicial review of that portion of the *Access Charge Order* abrogating the six month notice requirement. Since we have now granted Western Union's petition for reconsideration with regard to the Settlement Agreement issue, we shall dismiss Western Union's stay motion as moot.

218. And, it is further ordered, That the July 13, 1983 Motion for Partial Stay of Order filed by the Western Union Telegraph Company is dismissed as moot.

FEDERAL COMMUNICATIONS COMMISSION.

WILLIAM J. TRICARICO, *Secretary.*

Appendix A

Part 69—[Amended]

Part 69, Chapter 1 of Title 47, Code of Federal Regulations, is amended as follows.

1. In § 69.2, paragraphs (a), (j), (k), (m), (r), (t) are revised and paragraph (gg) is added to read as follows:

§ 69.2 Definitions.

* * * * *

(a) "Access Service" includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication;

* * * * *

(j) "Customer Outside Plant" or "Customer OSP" means all lines or trunks on the customer side of a Class 5 or end office switch, including lines or trunks that do not terminate in such a switch, except lines or trunks that connect an interexchange carrier;

(k) A "coinless pay telephone" is a public telephone provided by a telephone company through which an end user may originate interstate or foreign telecommunications for which he pays by credit card, collect, or third number billing procedures;

* * * * *

(m) "End user" means any customer of an interstate or foreign telecommunications service that is not a carrier, except that a carrier shall be deemed to be an "end user" to the extent that such carrier uses a telecommunications service for administrative purposes, without making such service available to others, directly or indirectly;

* * * * *

(r) "Interexchange" or the "interexchange category" includes services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as "access service" for purposes of this Part;

* * * * *

(t) "Line" or "trunk" includes, but is not limited to, transmission media such as radio, satellite, wire, cable and fiber optic cable means of transmission;

* * * * *

(gg) "Access minutes" or "access minutes of use" is that usage of exchange facilities in interstate or foreign service for the purpose of calculating chargeable usage. On the originating end of an interstate or foreign call, usage is to be measured from the time the

originating end user's call is delivered by the telephone company and acknowledged as received by the interexchange carrier's facilities connected with the originating exchange. On the terminating end of an interstate or foreign call, usage is to be measured from the time the call is received by the end user in the terminating exchange. Timing of usage at both the originating and terminating end of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating end exchanges, as applicable.

2. Section 69.3 is amended by removing paragraph (e)(9) and by revising paragraphs (e)(1), (e)(2), (e)(3), (e)(4), and (e)(8) to read as follows:

§ 69.3 Filing of access service tariffs.

* * * * *

(e) * * *

(1) Such a tariff must cross-reference association charges for the Carrier Common Line element if such company or companies participate in the distribution of revenues from such element;

(2) Such a tariff that cross-references an association charge for any end user access element must cross-reference association charges for all end user access elements;

(3) Such a tariff that cross-references an association charge for any carrier's carrier access element other than the Carrier Common Line element or the Billing and Collection element must cross-reference association charges for all carriers carrier access charges other than the Carrier Common Line element and the Billing and Collection element;

(4) Any charge in such a tariff other than a Billing and Collection charge that is not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

* * * * *

(8) To enable the association to prepare an access tariff for each year subsequent to 1984, each telephone company shall notify the association no later than June 30 of the preceding year of the projected average number of private line terminations, WATS closed end terminations and any other lines in the carrier's study area that would be subject to the Special Access surcharge.

3. Section 69.4 is amended by revising paragraphs (a) and (b) to read as follows:

§ 69.4 Charges to be filed.

(a) The end user charges for access service filed with this Commission shall include charges for the End User Common Line element.

(b) Except as provided in Subpart C of this Part, the carrier's carrier charges for access service filed with this Commission shall include charges for each of the following elements:

(1) Limited Pay Telephone;

(2) Carrier Common Line;

(3) Line Termination;

(4) Local Switching;

(5) Intercept;

(6) Information;

(7) Common Transport;

(8) Dedicated Transport; and

(9) Special Access.

* * * * *

4. A new § 69.5 is added to Subpart A to read as follows:

§ 69.5 Persons to be assessed.

(a) End user charges shall be computed and assessed upon end users, as defined in this Subpart, and as provided in Subpart B of this Part.

(b) Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services, except that carrier common line, line termination, local switching, intercept, information, and transport charges shall not be assessed upon an interexchange carrier to the extent that it resells services for which these charges have already been assessed (e.g., MTS, WATS and the MTS/WATS-type services of other common carriers), or that it resells private line service to offer services which are not MTS/WATS-type services.

(c) Special access surcharges shall be assessed upon users of exchange facilities which interconnect these facilities with means of interstate or foreign telecommunications, to the extent that carrier's carrier charges are not assessed upon such interconnected usage. As an interim measure, pending the development of techniques accurately to measure such interconnected use and to assess such charges on a reasonable and nondiscriminatory basis, telephone companies shall assess special access surcharges upon the closed ends of private line and WATS services pursuant to the provisions of § 69.115 of this Part.

§ 69.102 [Removed]

5. Section 69.102 is removed.

6. Section 69.103 is revised to read as follows:

§ 69.103 Limited Pay Telephone (pay telephones and coinless pay telephones which can access the services of only one interexchange carrier).

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon an interexchange carrier for each line terminating in a pay telephone or coinless pay telephone which can be used to originate any of its interstate or foreign telecommunications services, but not such services of other interexchange carriers.

(b) The per line charge shall be computed by dividing one-twelfth of the projected annual revenue requirement for the Limited Pay Telephone element by the projected average number of pay telephones and coinless pay telephones which can access the services of only one interexchange carrier

7. Section 69.104 is amended by revising paragraphs (a) and (c) to read as follows:

§ 69.104 End user common line.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service, Centrex or semi-public coin telephone service to the extent they do not pay carrier common line charges. Such charge shall be assessed for each line between the premises of an end user and a Class 5 office that is or may be used for local exchange service transmissions.

* * * * *

(c) For each class of party line service, *i.e.* 2-party, 4-party, etc., charges to subscribers of that category shall be computed by multiplying the single line rate by a fraction the numerator of which equals the annual projected number of lines used to provide the particular class of party line service and the denominator of which equals the annual projected number of subscribers to that class of party line service, but in no case shall a subscriber to party line service be charged more than the single line rate.

* * * * *

8. Section 69.105 is revised to read as follows:

§ 69.105 Carrier Common Line.

(a) A charge that is expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services, except that the charge shall not be assessed upon interexchange carriers to the extent that they resell MTS, WATS or the MTS/WATS-type services of other common carriers (OCCs) or that they resell private lines to offer services that are not OCC MTS/WATS-type services.

(b) A per minute charge shall be computed by dividing the revenue requirement for the Carrier Common Line element by the projected annual access minutes of use for all interstate or international services that use local exchange switching facilities and are subject to charges under paragraph (a) of this Section. Each minute of use of any local exchange switch by such services except closed end WATS minutes shall be counted for purposes of computing and assessing this charge.

9. Section 69.106 is revised to read as follows:

§ 69.106 Line Termination.

(a) A charge that is expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services, except that the charge shall not be assessed upon interexchange carriers to the extent they resell MTS, WATS, or MTS/WATS-type services of other common carriers (OCCs) or that they resell private lines to offer services that are not OCC MTS/WATS-type services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Line Termination element by the projected annual access minutes for all interstate or foreign services that use local exchange switching facilities and are subject to charges under paragraph (a) of this Section. Each minute of use of any termination in a local exchange switch by such services shall be counted for purposes of computing and assessing this charge.

10. Section 69.107 is amended by revising paragraphs (a), (b), (c), (d), (e), and (f) to read as follows:

§ 69.107 Local Switching.

(a) Charges that are expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services, except that the charges shall not be assessed upon interexchange carriers to the extent that they resell MTS, WATS or MTS/WATS-type services of other common carriers (OCCs) or that they resell private lines to offer services that are not OCC MTS/WATS-type services.

(b) Separate charges shall be established for two categories of services subject to charges under paragraph (a) of this Section. The first category, or LS 1, shall consist of local dial switching for services other than MTS, WATS and services receiving access to the local switch equal to that received by MTS and WATS. The second category, or LS 2, shall consist of local dial switching services for MTS, WATS and services receiving access to the local switch equal to that provided MTS and WATS.

(c) The projected annual revenue requirement for Local Switching shall be apportioned between LS 1 and LS 2 as follows. The projected annual revenue requirement attributable to the Category 4 central office equipment assigned to this element shall be apportioned between LS 1 and LS 2 on the basis of the relative number of messages in each of these categories for which this equipment records billing information. The projected annual revenue requirement attributable to the Category 5 central office equipment assigned to Local Switching shall be assigned to the LS 2 element. The remainder of the projected annual revenue requirement for Local Switching shall be apportioned between LS 1 and LS 2 on the basis of weighted relative usage. Each LS 1 dial equipment minute shall be counted as one. LS 2 dial equipment minutes shall be multiplied by the Toll Weighting Factor of TWF that is used for jurisdictional separations purposes to allocate investment in a particular type of switch.

(d) A per minute charge for the LS 1 category shall be computed by dividing the LS 1 portion of the projected annual revenue requirement by the projected annual LS 1 access minutes of use.

(e) A per minute charge for the LS 2 category shall be computed by dividing the projected LS 2 annual revenue requirement by the projected LS 2 access minutes of use.

(f) If end users of an interstate or foreign service that uses local switching facilities pay message unit charges for such calls in a particular exchange, a credit shall be deducted from the Local Switching element charges to such carrier for access service in such exchange. The per minute credit for each such exchange shall be multiplied by the monthly access minutes for such service to compute the monthly credit to such a carrier.

* * * * *

11. Section 69.108 is revised to read as follows:

§ 69.108 Intercept.

(a) A charge that is expressed in dollars and cents per access minute of use shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications, except that the charge shall not be assessed upon interexchange carriers to the extent that they resell MTS, WATS or the MTS/WATS-type services of other common carriers (OCCs), or that they resell private lines to offer services that are not OCC MTS/WATS-type services.

(b) A per minute charge shall be computed by dividing the projected annual revenue requirement for the Intercept element by the projected annual access minutes of use for

all interstate or foreign services that use local exchange switching facilities and are subject to charges under paragraph

(a) of this Section.

§ 69.110 [Removed]

12. Section 69.110 is removed.

13. Section 69.111 is amended by revising paragraph (a) as follows:

§ 69.111 Common transport.

(a) A charge that is expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers that use switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning net investment, except that the charge shall not be assessed upon interexchange carriers to the extent they resell MTS, WATS or the MTS/WATS-type services of other common carriers (OCCs), or that they resell private lines to offer services that are not OCC MTS/WATS-type services.

* * * * *

14. Section 69.113 is amended by revising paragraph (c) to read as follows:

§ 69.113 Special access.

* * * * *

(c) Charges for an individual element shall be assessed upon all interexchange carriers that use the equipment or facilities that are included within such subelement.

* * * * *

15. Section 69.114 is amended by revising paragraph (b) to read as follows:

§ 69.114 Billing and collection.

* * * * *

(b) Any charges for such service or billing information service must be reasonable and nondiscriminatory.

16. A new § 69.115 is added to subpart B to read as follows:

§ 69.115 Special Access surcharges.

(a) Pending the development of techniques accurately to measure usage of exchange facilities which are interconnected by users with means of interstate or foreign telecommunications, a surcharge which is expressed in dollars and cents per line termination per month shall be assessed upon users that subscribe to private line or WATS services which are not exempt from assessment pursuant to Subsection (e) of this Section.

(b) Such surcharge shall be computed to reflect a reasonable approximation of the carrier usage charges which, assuming non-premium interconnection, would have been paid for average interstate or foreign usage of common lines, end office facilities, and transport

facilities, attributable to each Special Access line termination which is not exempt from assessment pursuant to Subsection (e) of this Section.

(c) If the association, carrier or carriers, that file the tariff are unable to estimate such average usage for 1984, the 1984 surcharge shall be twenty-five dollars ($25.00) per line termination per month.

(d) A telephone company may propose reasonable and nondiscriminatory end user surcharges, to be filed in its federal access tariffs and to be applied to the use of exchange facilities which are interconnected by users with means of interstate or foreign telecommunication which are not provided by the telephone company, and which are not exempt from assessment pursuant to Subsection (e) of this Section. Telephone companies which wish to avail themselves of this option must undertake to use reasonable efforts to identify such means of interstate or foreign telecommunication, and to assess end user surcharges in a reasonable and nondiscriminatory manner.

(e) No special access surcharges shall be assessed for any of the following terminations:

(1) The open end termination in a telephone company switch of an FX line, including CCSA and CCSA-equivalent ONALs;

(2) Any termination of an analog channel that is used for radio or television program transmission;

(3) Any termination of a line that is used for telex service;

(4) Any termination of a line that by nature of its operating characteristics could not make use of common lines; and

(5) Any termination of a line that is subject to carrier usage charges pursuant to Section 69.5.

17. Section 69.201 is revised to read as follows:

§ 69.201 General.

Notwithstanding §§ 69.4, 69.104 and 69.105, charges for the access elements described in this subpart shall be computed in accordance with this subpart during the period commencing January 1, 1984 and ending December 31, 1989.

18. Section 69.202 is revised to read as follows:

§ 69.202 End User Common Line charge.

An End User Common Line charge that is the lesser of the charge that would have been computed pursuant § 69.104(d) for the year in question or the charge described in §§ 69.203 and 69.204 shall be assessed upon each local exchange service subscriber, including subscribers to semi-public telephone service.

19. Section 69.203 is revised to read as follows:

§ 69.203 Charges for 1984-1986.

(a) The monthly residential line charge shall be $2.00 in 1984, $3.00 in 1985 and $4.00 in 1986.

(b) The monthly business line charge shall be $6.00 in 1984, 1985 and 1986.

(c) A line that is used for Centrex-CO service shall be deemed to be a residential line for purposes of this section and § 69.204 if such line was in use or on order on July 27, 1983. All other lines used for Centrex-CO service shall be deemed to be business lines.

(d) For purposes of this section and § 69.204, a line shall be deemed to be a residential line if the subscriber pays a rate for such line that is described as a residential rate in the local exchange service tariff. All other lines except Centrex-CO lines in use or on order on July 27, 1983 shall be deemed to be business lines.

20. Section 69.204 is revised to read as follows:

§ 69.204 Charges for 1987-1989.

(a) The End User Common Line part of the transitional portion that is computed pursuant to § 69.503 of this part shall be divided by the projected average number of common lines in use to determine a per line amount. The per line amount shall be added to the $4.00 residential and $6.00 business charges to determine tentative charges for residential and business lines.

(b) If the tentative business line charge does not exceed the charge that would have been computed pursuant to § 69.104(d), the tentative charges shall be assessed for each business or residential line.

(c) If the tentative business line charge exceeds the § 69.104(d) charge, the § 69.104(d) charge shall be assessed for each business line. The residential charge shall be the tentative residential charge and an amount that is computed by dividing the difference between the sum of the tentative charges for all business lines and the sum of § 69.104(d) charges for all business lines by the projected average number of residential lines.

21. Section 69.205 is revised to read as follows:

§ 69.205 Transitional Carrier Common Line charges.

(a) In 1984 Carrier Common Line charges to carriers that do not receive premium access shall be computed by multiplying the access minutes of use of such carriers by .65.

(b) In the absence of a Commission order designating a different factor, charges to carriers that do not receive premium access shall be computed by multiplying access minutes of use of such carriers by .77 in 1985, by .88 from January 1, 1986 through August 31, 1986 and by 1.00 thereafter. Projected access minutes shall be multiplied by the applicable factor for purposes of computing the per minute charge.

(c) For purposes of this section, carriers that provide MTS and WATS shall be deemed to receive premium access.

§ 69.206 [Removed]

22. Section 69.206 is removed.

§ 69.207 [Removed]

23. Section 69.207 is removed.

§ 69.208 [Removed]

24. Section 69.208 is removed.

25. Section 69.302 is amended by revising paragraph (b)(4) to read as follows:

§ 69.302 Net Investment.

* * * * *

(b) * * *

(4) Investment that is not COE, OSP or Buildings investment shall be apportioned among the interexchange category and appropriate access elements in the same proportions as the associated investment in Account 100.1.

26. Section 69.303 is amended by revising paragraph (b), (c), and (d) to read as follows:

§ 69.303 Station equipment.

* * * * *

(b) Investment in pay telephones and coinless pay telephones and appurtenances shall be assigned to the Common Line Element, if capable of use with the services of more than one interexchange carrier, or the Limited Pay Telephone element, if capable of use with the services of only one interexchange carrier.

(c) Investment in all other station equipment shall be apportioned between the Special Access and Common Line elements on the basis of the relative number of equivalent lines in use. Each interstate or foreign Special Access line shall be counted as one or more equivalent lines where channels are of higher than voice bandwidth, and the number of equivalent lines shall equal the number of voice capacity analog or digital channels to which the higher capacity is equivalent. Local exchange subscriber lines shall be multiplied by the interstate separations factor for non traffic sensitive plant to determine the number of equivalent local exchange subscriber lines.

(d) Any investment that is apportioned to interstate and foreign services as a surrogate for customer premises equipment shall be apportioned between special access and common line elements in the same manner as investment apportioned pursuant to paragraph (c) of this section.

27. Section 69.304 is amended by removing paragraphs (d), (e) and (f) and revising paragraphs (a), (b) and (c) to read as follows:

§ 69.304 Customer OSP.

(a) Investment in local exchange subscriber lines shall be assigned to the Common Line element.

(b) Investment in interstate and foreign private lines and WATS access lines shall be assigned to the Special Access element.

(c) Investment in lines terminating in coinless pay telephone shall be assigned to the Coinless Pay Telephone element. Investment in all other lines terminating in pay telephones shall be assigned to the Common Line Element.

28. Section 69.305 is amended by revising paragraphs (b) and (c) to read as follows:

§ 69.305 Carrier OSP.

* * * * *

(b) Carrier OSP, other than WATS access lines not assigned pursuant to paragraph (a) of this section, that is used for interexchange services that use switching facilities for origination and termination that are also used for local exchange telephone service shall be apportioned between the Dedicated Transport and Common Transport elements. Such OSP shall be assigned to the Dedicated Transport element if it is used exclusively for the interexchange services of a particular carrier.

(c) All Carrier OSP that is not apportioned pursuant to paragraphs (a) and (b) of this section shall be assigned to the Special Access element.

29. Section 69.306 is amended by revising paragraphs (b), (c), (e), (f), and (i) to read as follows:

§ 69.306 Central office equipment.

* * * * *

(b) Category 1 COE (Manual Switchboards) shall be apportioned among the interexchange category and the access elements as follows. COE 1 that is used for intercept services shall be assigned to the Intercept element. COE 1 that is used for directory assistance shall be assigned to the Information element. COE 1 other than service observation boards that is not assigned to the Intercept or Information elements shall be assigned to the interexchange category. Service observation boards shall be apportioned among the interexchange category and the Intercept, Information, Common Transport, Local Switching and Billing and Collection access elements based on the remaining combined investment in COE 1 through COE 6, excluding the non traffic sensitive portion of COE 6.

(c) Category 2 COE (Tandem Switches) that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States v. Western Electric Co.* shall be assigned to the Common Transport element. All other COE 2 shall be assigned to the interexchange category.

* * * * *

(e) Category 4 COE (Automatic Message Recording Equipment) that is used for the duration of an interstate call that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States v. Western Electric Company* shall be assigned to the Billing and Collection element. All other COE 4 that is used for the duration of an interstate call shall be assigned to the interexchange category. Category 4 COE used only momentarily to record information about interstate switched private service traffic that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States v. Western Electric Company* shall be assigned to the Special Access element. All other COE 4 that is used only momentarily to record information about interstate switched private services traffic shall be assigned to the interexchange category. If a telephone company offers Billing and Collection services, it shall assign one-half the investment in COE 4 that is used only momentarily to record information about interstate message service to the Billing and Collection element and one-half of this investment to the Local Switching element. If it offers no billing and collection services, it shall assign the investment in COE 4 used only momentarily to record information about interstate message service to the Local Switching element.

(f) Category 5 COE (Other Dial Switching Equipment) in a Class 4 or functionally equivalent switch that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States v. Western Electric Co.* shall be assigned to the Common Transport element. All other Category 5 COE in a Class 4 or functionally equivalent switch shall be assigned to the interexchange category. All Category 5 COE in end offices shall be assigned to the Local Switching element.

* * * * *

(i) Category 8 COE (Circuit Equipment) shall be apportioned among the interexchange category and the Common Line, Coinless Pay Telephone, Dedicated Transport, Common Transport and Special Access elements. COE 8 shall be apportioned in the same proportions as the associated OSP except as provided in paragraph (a) of this Section.

30. Section 69.307 is amended by revising paragraphs (b), (c), (d), (e), (f), and (i), to read as follows:

§ 69.307 Buildings.

* * * * *

(b) Category 1A space investment (Manual Switchboard) shall be apportioned among the interexchange category and the Intercept and Information elements. Such investment shall be apportioned in the same proportions as COE 1 investment.

(c) Category 1B space investment (Circuit Equipment) shall be apportioned among the interexchange category and the Common Line, Limited Pay Telephone, Dedicated Transport, Common Transport and Special Access elements. Such investment shall be apportioned in the same proportions as COE 8 investment.

(d) Category 1C space investment (Dial Switching) shall be apportioned among the interexchange category and the Line Termination, Local Switching, Common Transport, Billing and Collection and Special Access elements. Such investment shall be apportioned in the same proportions as combined investment in COE categories 2, 3, 4, 5, 6 and 7.

(e) Category 2 space investment (Operator Quarters) shall be apportioned among the interexchange category and the Intercept and Information elements in the same proportion as Operator Wages (Account 624). Category 3 space investment (General Traffic Supervision) shall be apportioned among the interexchange category and the Intercept and Information elements in the same proportion as General Traffic Supervision Expense (Account 621).

(f) Category 4 space investment (Commercial Office) shall be apportioned among the interexchange category and all access elements. Such investment shall be apportioned in the same proportions as combined commercial expense.

* * * * *

(i) Category 7 space investment (Garage and Storerooms) shall be apportioned among the interexchange category and all the access elements. Such investment shall be apportioned in the same manner as combined investment in OSP, Materials and Supplies and Station Equipment.

* * * * *

31. Section 69.308 is amended by revising paragraph (c) to read as follows:

§ 69.308 Land.

* * * * *

(c) Investment in storage space shall be apportioned among the interexchange category and the Common Line, Limited Pay Telephone, Dedicated Transport, Common Transport

and Special Access elements. Such investment shall be apportioned in the same proportions as combined OSP investment.

* * * * *

32. Section 69.309 is revised to read as follows:

§ 69.309 Other Investment.

Investment that is not apportioned pursuant to §§ 69.303-69.308 shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment other than commercial office space investment that is apportioned pursuant to §§ 69.303-69.308

33. Section 69.404 is revised to read as follows:

§ 69.404 Traffic Expenses.

(a) The Network Administration portion of Accounts 621 and 624 shall be apportioned among the interexchange category and the Intercept, Information, Common Transport, Line Termination, Local Switching, Special Access, and Billing and Collection elements in the same proportions as investments in COE categories 1, 2, 3, 4, 5, 6 and 7.

(b)The Centralized Ticket Investigation portion of Account 624 should be directly assigned to the Billing and Collection element.

(c) The Traffic Engineering portion of Account 621 shall be apportioned among the interexchange category and all access elements in the same proportions as combined investment in COE and interexchange OSP.

(d) All other traffic expenses shall be apportioned among the interexchange category, and the Intercept and Information elements based on weighted standard work time seconds.

34. Section 69.405 is revised to read as follows:

§ 69.405 Commercial expenses.

(a) Sales expenses (Account 643) and Advertising expenses (Account 642) shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment that is apportioned pursuant to § 69.309.

(b) Connecting Company Relations expenses (Account 644) shall be assigned to the interexchange category.

(c) Local Commercial expenses directly attributable to pay telephone collections shall be assigned to the Common Line element. All other Local Commercial expenses shall be apportioned among access elements and the interexchange category in the same proportions as Revenue Accounting expenses.

(d) Public Telephone Commissions expense (Account 648) shall be apportioned between the Coinless Pay Phone and Common Line elements based upon the relative number of public telephones in each category.

(e) Directory expenses (Account 649) shall be assigned to the Information element.

(f) All other Commercial expenses (Accounts 640 and 650) shall be apportioned among the interexchange category and the access elements in the same proportions as the combined expense apportioned to the interexchange Category and to each element pursuant to paragraphs (a)-(e) of this section.

35. Section 69.406 is amended by revising paragraph (a) to read as follows:

§ 69.406 Revenue Accounting Expenses.

(a) Revenue Accounting Expenses that are attributable to End User Common Line access billings shall be assigned to the Common Line element.

* * * * *

36. Section 69.501 is amended by revising paragraph (d) and by adding (e) to read as follows:

§ 69.501 General.

* * * * *

(d) Any portion of the Common Line element revenue requirement that is attributable to pay telephone investment or expense shall be assigned to the Carrier Common Line element or elements.

(e) Any portion of the Common Line element revenue requirement that is not assigned to Carrier Common Line elements pursuant to paragraphs (a), (b), (c) and (d) of this section shall be apportioned between End User Common Line and Carrier Common Line pursuant to §§ 69.502 and 69.503. Such portion of the Common Line element annual revenue requirement shall be described as the base factor portion for purposes of this Subpart.

37. Section 69.502 is revised to read as follows:

§ 69.502 Base Factor Apportionment.

(a) In 1984, 1985 and 1986 the projected revenues from the End User Common Line charges and Special Access surcharges shall be deducted from the base factor portion to determine the amount that is assigned to the Carrier Common Line element.

(b) In 1987, 1988 and 1989 the revenues that would be projected if End User Common Line charges were computed at 1986 rates shall be deducted from the base factor portion to determine the transitional portion. The transitional portion shall be apportioned in accordance with § 69.503.

38. Section 69.503 is revised to read as follows:

§ 69.503 Apportionment of Transitional Portion.

(a) In 1987 access charges, 75% of the transitional portion shall be assigned to the Carrier Common Line element. The residue shall be assigned to the End User Common Line element.

(b) In 1988 access charges, 50% of the transitional portion shall be assigned to the Carrier Common Line element. The residue shall be assigned to End User Common Line element.

(c) In 1989 access charges, 25% of the transitional portion shall be assigned to the Carrier Common Line element. The residue shall be assigned to the End User Common Line element.

(d) The transitional portion shall be assigned to the End User Common Line element in access charges for 1990 and subsequent years.

39. Section 69.604 is amended by revising paragraph (a) to read as follows:

§ 69.604 Billing and collection of access charges.

(a) The association shall bill and collect all Carrier Common Line access charges.

* * * * *

40. Section 69.605 is amended by revising paragraph (c)(1) to read as follows:

§ 69.605 Distribution of Carrier Common Line revenues.

* * * * *

(c) * * *

(1) After December 31, 1985, any company that directly or indirectly controls, is directly or indirectly controlled by, is under direct or indirect control with, or merges with a telephone company that did not participate in average schedule settlements on December 1, 1982, shall not be deemed to be an average schedule company; and

* * * * *

41. Section 69.607 is amended by revising paragraph (c) to read as follows:

§ 69.607 Disbursement of Carrier Common Line residue.

* * * * *

(c) The hypothetical net balance for each company shall be the sum of the hypothetical net balances for each access element except the Billing and Collection element. Such hypothetical net balances shall be computed in accordance with §§ 69.608-69.610

Appendix B—Summary of Commenting Parties' Filings[1]

ABC-CBS-NBC (Networks)

The networks believe that the AT&T/GTE proposals concerning voice grade private lines could confuse assignment of costs to TV and audio transmission services. As was recognized in the Order, program transmission needs special treatment. The networks request a special category, entitled "special access program transmission services."

The networks are concerned that AT&T/GTE proposals could result in confusion as to whether program transmission is responsible for recovery of costs associated with non-dedicated station equipment.

The networks point out that special access subelements were not defined, and that no party has disputed that program transmission is a separable dedicated service. Prescribing rules to establish such a category rather than waiting for carriers to do so would effectuate the Commission's intent.

The Ad Hoc Telecommunications Users Committee

Ad Hoc believes it incumbent upon the Commission to clarify that an interexchange carrier's ability to allocate costs not directly allocated is constrained by allocation rules and practices heretofore used. Private line dedicated interoffice facilities might be treated as a

[1] In this Appendix we summarize the principal contentions of each person participating in this reconsideration proceeding without regard to whether these contentions appeared in a petition, opposition or reply. In the text of the *Memorandum Opinion and Order* we identify the persons filing comments at each state of the proceeding.

subelement of dedicated transport. Ad Hoc believes that this clarification fully comports with the intent and may not require rule changes.

The access charge should not be applied to Centrex-CO because under Centrex-CO the number of lines received is not equal to the number of lines needed for access. States treat intercom and local functions of Centrex differently. Ad Hoc perceives a more favorable treatment of ESSX service solely due to software distinctions.

Ad Hoc states that existing Division of Revenue procedures recognize a PBX trunk equivalency in establishing Centrex NTS revenue requirements. Application of an unweighted common line charge would result in overrecovery of NTS costs associated with Centrex. Since such ratios are already used for separations, no new evidence is needed for calculation of appropriate ratios.

Ad Hoc urges the Commission to reconsider its rules so that the interim end user common line charge will be billed on a usage basis instead of being allocated to interexchange carriers. Many carriers cannot bill according to the rules. Removal of the cap would eliminate the need for the "equal attribution" feature prescribed for multiline customers. The recommended change would also make it possible to compute the interexchange carrier surcharge for open-end FX.

Ad Hoc states that classification of enhanced service providers and resellers as carriers would create serious enforcement and implementation problems. Ad Hoc notes that neither the Second, nor the Fourth Notices provided notice that enhanced service providers or pure resellers were to be subjected to anything other than end user charges. It would be virtually impossible to avoid double-billing of resellers, enhanced service providers and underlying carriers. No offsetting credit could be calculated. Local carriers also cannot know what traffic is properly subject to access charges.

Ad Hoc states that elimination of the end user usage charge and the imposition of carrier charges only upon facilities-based carriers would resolve many issues concerning OCCs.

Ad Hoc views AT&T's request that all private line loops be reclassified as special access as without merit. Instead, reference to CPE should be deleted. Ad Hoc believes that transferring all private lines to special access would exacerbate the already serious cost allocation problem in that element. Ad Hoc supports AT&T's suggestion that interexchange carriers be allowed to acquire dedicated access lines as agents for customers. Interexchange carriers, however, should be required to unbundle such charges.

Ad Hoc believes that agency arrangements with AT&T need not be anticompetitive. Non-carriers, however, should also be allowed to serve as agents for end users.

Ad Hoc believes that UTCC's position on Centrex is motivated by self-interest and disagrees with UTCC's assertion concerning greater network costs associated with Centrex.

Ad Hoc notes that AT&T's unbundling recommendations are lacking in detail. Ad Hoc believes that local switching should be unbundled to reflect differences in inferior or superior access arrangements. AT&T should be required to detail unbundling pursuant to the reporting requirements.

Ad Hoc recommends that the Commission address conversation minutes in a way that resolves differences in access conditions.

Ad Hoc believes that the issue of universal service support for traffic sensitive costs can be dealt with in the context of attempts to deaverage toll rates.

In light of the many issues to be resolved on reconsideration Ad Hoc recommends delay of the October 3 filing date if necessary.

Alascom, Inc.

Alascom limits its reply to rate integration. Alascom supports the policy of Alaskan rate integration.

Alascom believes that the separate proceeding requested by Alaska is appropriate if further steps are needed to assure that full integration is possible in light of access charges.

State of Alaska/Alaska PUC

Alaska's primary concern is that there will be inadequate financial support for high cost exchanges, damaging universal service.

Alaska believes that the Order reverses the Commission's policy of rate integration for offshore points. The access charge mechanism is not consistent with existing negotiated inter-carrier agreements and the support mechanism under the Order provides no funds for rate integration. The Order also undermines rate integration by limiting the USF to NTS plant. The Order could be modified to support rate integration. At a minimum, the USF should also support traffic sensitive costs.

Alaska includes a Petitions for Rulemaking with the objective of establishing a permanent mechanism for the integration of rates and services between the contiguous states and Alaska, Hawaii, Puerto Rico and the Virgin Islands.

Alaska believes that, if the Commission means to reverse its policies supporting rate integration of offshore points, it can do so only after satisfying notices requirements not yet met.

ALTEL

ALTEL points out that it is difficult to determine who resellers are. ALTEL supports Ad Hoc's petition to relieve "pure" resellers from carrier's carrier charges. Failure to do so would result in wide-scale discrimination and arbitrary application of access charges.

ALTEL further states that resellers will be doubly charged to the extent that facility carriers include carrier common line charges in rates for services to be resold. ALTEL recommends that the charges be levied upon facility based carriers, stating that the number of messages is the same regardless of where the charge is applied.

ALTEL believes that the access charge plan is certain to be arbitrary, inconsistently applied, threatens harsh and unwarranted subsidy burdens on an unsuspecting and nonculpable segment of the market, and is unworkable, unfair and unlawful.

ALTEL calls for rejection of AT&T proposals to facilitate reseller charges and refunds.

ARINC

ARINC agrees with Ad Hoc that transitional surcharges discriminate unreasonably against interstate FX subscribers. A cap on FX surrogate charges is needed. ARINC believes a refinement to the Ad Hoc proposal is needed. That is, the dedicated access line surcharge should be reduced during the transition in proportion to the increase in flat charges paid by businesses. During the transition, FX users would pay a transitional surcharge equal to the usage charge times the number of calls received but not to exceed the dedicated access line rate minus the flat business subscriber charge.

ARINC agrees with Ad-Hoc that the definition of dedicated access should not depend on CPE; it opposes separate access treatment of private and WATS access lines. ARINC proposes that all dedicated access lines be put into a single category and that specific guidelines be adopted to ensure proper cost allocation within that category.

Association of Data Communications Users

ADCU notes that the Order does not specify whether the 20 percent per year reduction in carrier common line charges is based on a fixed sum or would take into account increases in NTS costs. ADCU requests clarification as to how the Commission arrived at the $8.5 billion cited as the interstate NTS revenue requirement for 1984, and how the interstate NTS exchange plant requirement will be calculated in subsequent transition years. ADCU is requesting clarification of whether access charges will cover maintenance of dedicated private line service data lines and other services provided in the past. ADCU believes that if users are paying access charges based on the costs for maintenance and service, these services should be rendered.

ADCU petitions for reconsideration of the creation of a universal service fund. ADCU believes that the USF is incorrect as a matter of both law and policy. Congress has not determined that one class or category of users is obligated to subsidize another. The Commission has not addressed alternative services which might be offered by local companies at less expensive rates. One such offsetting factor is the option to purchase a phone.

ADCU asks the Commission to assert federal jurisdiction over all NTS and appropriate TS costs involved in accessing local exchange facilities for originating and terminating long haul traffic. Allocation of these costs is arbitrary and results in discrimination.

ADCU does not believe that exchange carriers should have the wide latitude in devising minimum, usage, and maximum end user charges allowed in the Order since such charges could lead to exorbitant local exchange rates. The Commission's plan also incorporates incentives for bypass.

The Commission has not provided any incentives to hold down NTS costs since these can be passed on to end users. ADCU submits that the maximum user common line charges should be revised to accurately reflect the Commission's estimated NTS revenue requirement of $8.50/line.

Association of Data Processing Service Organizations (ADAPSO)

ADAPSO asks the Commission to eliminate the distinction between enhanced service providers and other end users. ADAPSO notes that extension of carrier charges to enhanced service providers is unexplained, unsupported by the record, and unworkable. As a result, it is in violation of Section 205(a) requirements. Moreover, the access charges to be paid by enhanced services are not clearly identified.

ADAPSO argues that time-sharing services function very differently than MCI's network and that the only possible basis for inclusion of enhanced service carriers in the assessment of carrier charges was an MCI complaint.

The finding of discrimination can take place only when services are "like," ADAPSO argues. In fact, the services received by remote access data processors are like those used by businesses to provide in-house services. Classification on the basis of a line of business rather than of use is an "arbitrary" classification and hence contrary to the Act.

The distinction between an end user and an enhanced service provider is unclear and unworkable. ADAPSO states that the access charge order leads into the definitional quagmire that the Commission escaped in Computer II.

ADAPSO also sees problems with implementation so such a charge even if enhanced providers are identified. Minutes of use would be difficult to measure and there is a strong possibility that double counting of minutes would result.

AT&T

AT&T believes that Centrex should not have to pay the $4 business end user charge. Such a charge would discriminate in favor of equivalent PBXs, and would harm groups least able to pay. AT&T proposes a PBX trunk equivalency standard for Centrex charges. Without this charge, large amounts of capacity would be idled and other rates would rise. AT&T states that Centrex users pay their total costs through combined state and interstate charges. Hence a $4 charge is not consistent with the goals of the access charge decision.

AT&T agrees with TAM's suggestion that PBX equivalents be measured based upon customer locations. AT&T states, however, that location-by-location PBX equivalency comparisons do not make sense because PBX customers would not have a PBX in each location. Thus main stations served by a Centrex office would be used in determining PBX trunk equivalents. AT&T argues that the evidentiary hearing sought by NATA to determine PBX trunk equivalents is not required since there is no time and since parties will have a chance to demonstrate the appropriateness of alternatives after tariffs are filed.

AT&T states that there is an apparent conflict between multi-carrier EAS rules and averaging rules. It suggests that Section 69.3(e)(8), of the Rules, which states that access rates should apply to the entire extended area, be deleted. AT&T believes that the rules would require an exchange carrier participating in a multi-carrier EAS arrangement to charge outside the EAS at the same rate charged within the EAS area regardless of its costs, and that this is contrary to Commission objectives. Such a result would conflict with the ability of carriers to align rates with costs, cannot be squared with the Commission's decision to use its power to compel common tariffing sparingly, and would be inconsistent with rate flexibility objectives. The rule could require that each carrier use its study area average costs in the development of the "joint access" rates for multi-carrier EAS areas. The Independent Alliance misperceives the EAS problem, AT&T states. The problem is lack of a division of revenue agreement. A uniform rate does not solve this problem. The proposed EAS revisions would not harm carriers and would increase flexibility.

AT&T suggests modifying local switching access into subelements to reflect new access arrangements. The present rules are service specific and do not recognize possible changes. Classifications should be based on how local facilities are actually used by carriers. AT&T recommends two elements, Transport Termination and Common Switching. This division would allow cost and functionally based subelements.

AT&T notes that intercept service costs are recovered in the same manner as local switching and it would be easier to merge these elements.

AT&T recommends new definitions for conversation minutes and for special access. Appropriate definition of conversation minutes is necessary for charging consistency. Calling parties have traditionally been charged for completed calls and carriers for deliveries. The term "conversation" minute should reflect this distinction.

AT&T asks that conversation minutes be measured from carrier or customer acknowledgement of receipt until disconnected. This definition allows consistent treatment of interexchange carriers.

AT&T points out that the dedicated access/special access distinction depends on CPE termination and is, therefore, impossible to implement. AT&T recommends that dedicated access include only access lines which (a) provide a dedicated link between a single interexchange carrier and a single end user, and (b) are switched through a local office on the customer side of the end office. The similar portion of private lines would be classified as special access.

AT&T states that the Order did not justify excluding carriers from securing access facilities to offer end-to-end private line, etc., and claims that no party that understands its proposal to allow carriers to purchase dedicated access lines disagrees. Separately identified rates is an interexchange rate question.

ARINC's concern that treating all private lines as special access will leave unreasonable flexibility to interexchange carriers misses the point that the charges come from exchange carriers and the Commission can oversee rates. AT&T believes that the Rules are clear enough to prevent improper cost assignment, but would not object to further clarification.

AT&T states that WU's concern that Bell's proposals will allocate station equipment to closed ends that do not use local switching reflects a desire to change current Commission prescriptions.

AT&T recommends that the ECA collect only the premium access assessment and perhaps the charges to finance the USF. Doing otherwise would require development of a highly sophisticated billing system for a transitional charge.

AT&T notes that the Commission appears to treat Billing and Collection as a part of the TS charges. The ECA should be permitted to administer Billing and Collection as a separate and distinct pool, and carriers could cross-reference the TS rate yet provide their own billing tariff.

AT&T recommends expanding the transitional surcharge to credit card and third party billed calls. It notes that those services are similar to collect, in-WATS or open end F calls. It would also expand the language to include other non-sent paid services that may be offered in the future.

AT&T argues that the OCC billing option discussed in the Order is unworkable and that ENFIA services should be subjected to a transitional surcharge. Customer identification numbers do not relate to lines. Not imposing a surrogate charge on OCCs would disadvantage AT&T. Exchange carriers would be put at risk. OCCs would have incentives to maintain or expand inefficient ENFIA access. While a cap on surrogates is not feasible, the adjustment would equalize charges.

Absent a surrogate, exchange carriers may be forced to move to flat charges sooner than market forces would otherwise require. AT&T states that MCI's apparent belief that dedicated access applies to ENFIA A is wrong. Such a result is not consistent with the equal charge requirement and would not fill the role of a surrogate.

AT&T believes that the OCCs are wrong concerning Commission authority to shorten the Docket 20099 notice requirement and mistaken in their belief that the record does not support such a decision. Western Union's claim that it had no notice demonstrates an amazing unfamiliarity with the record. The record justifies the conclusion that a six-month notice cannot be granted. Final tariff filing is stymied by the need for correction or clarification of the rules. AT&T expects to file approximately 90 days after the Reconsideration Order. Due to careful Commission prescription of rules, the access charge filing will lack much of the controversy and complexity that have attended other filings.

AT&T believes that anyone that orders an access facility should pay but only one carrier common line charge should be assessed per call. Resellers would receive an offsetting credit if they resell a service that includes a carrier common line charge. If enhanced service providers purchase access facilities, they should pay for access. Resellers and enhanced service providers are not being reclassified as carriers by the Order.

AT&T notes that broad averaging is inconsistent with a sound access plan. Initial filing necessitates constraints, but these needs subsequently diminish. The Commission should remove restrictions as this becomes necessary.

Although AT&T supports disaggregation below the study area, it argues that such consideration is not essential for tariff development and should be delayed.

AT&T proposes rule changes that will, it claims, provide that the pay phone category include all pay stations provided by the telephone company, recover pay telephone revenue requirements evenhandedly from all interexchange carrier services that can be accessed from pay telephones, and impose a charge to recover the pay telephone revenue requirement on interexchange carriers rather than on end users.

AT&T states that pay telephone solutions suggested by Discount Phone are unworkable as they require call measurement capabilities that are not generally available. Other suggestions include loading these costs on interexchange carriers or on end users. On balance, recovering these revenues from carriers is more consistent with the Commission's objectives. Since the majority of costs would be collected from carriers anyway due to non-sent paid calls, AT&T suggests that it would be most practical to treat all pay phone costs this way.

AT&T notes that, read literally, Part 69 might appear to preclude non-recurring charges, or separable rate elements of local switching. It asks that this be clarified and that such charges be allowed.

AT&T sees no need to alter the transport rules, merely to waive them. Sorting out the rules is not necessary for initial tariff development. It argues that SPCC's opposition to AT&T's proposal to develop a transport termination element is based on the faulty premise that termination is part of transport. In fact, this element recovers switching costs.

AT&T notes that the rules do not explicitly state that an exchange carrier may immediately recover the entire end user portion through flat charges while the Order does allow this. Such an option is necessary.

AT&T finds the premium charge objectionable but believes that consideration of the USF should take place in Docket 80-286.

AT&T states that OCC concerns about overcharges in the billing element do not reflect the competitive nature of this service. Since the billing option for end user usage charges is unworkable, no OCC will be forced to subscribe to this charge.

ATTIX

ATTIX does not contest the size of the premium due to the need for an access charge. Because the premium is in conflict with cost-based pricing, ATTIX believes that, if it is to be reconsidered, it should be eliminated. The opportunity cost rationale is incorrect because it cannot be squared with cost-based pricing and because MTS/WATS access does not have a meaningful opportunity cost. Network efficiency will not be achieved if an access charge is based upon a speculative opportunity cost unrelated to the cost of service. Access charges for MTS and WATS providers will be artificially overpriced. Customers and investors will turn away from artificially overpriced services. The result is similar to uneconomic bypass. ATTIX views the premium as a handicap on the competitive capabilities of the MTS and WATS providers and as inconsistent with a competitive marketplace. Moreover, such a charge would result in discrimination against MTS-WATS customers. ATTIX states that the OCCs' purpose in requesting increased premium charges is to gain unfair and unwarranted advantage over AT&T's interexchange operations.

ATTIX believes that the $1.4 billion premium charge vastly overstates the opportunity cost of premium access. OCCs have been slow to order ENFIA B and C arrangements despite the improved access that these allow.

ATTIX states that arguments of those in support of higher premium charges are flawed. Valuation of opportunity cost should be calculated between the best generally available access and the access that can be offered only to one carrier. OCCs base their evaluation on ENFIA A, not the superior ENFIA B-C arrangements.

ATTIX believes that full and fair competition should begin. A penalty on ATTIX that goes beyond the current premium has no place in a competitive marketplace.

In an Appendix, ATTIX argues that OCC studies of costs of inferior access are flawed. They rely on ENFIA A and are speculative. Rotary dial levels are lower than those cited. Rotary dial access is available under ENFIA B. SBS's estimate of the cost of a tone generator is too high. The cost of a tone generator is unlikely to inhibit calling much significantly.

ATTIX states that any carrier could offer an 800-type service. SBS's claims of costs for network enhancements are without foundation. SBS is likely to need echo suppressors due to use of satellites. Use of ENFIA B-C allows more control over loss and mitigates the need for network enhancements.

ATTIX argues that examination of uncollectibles must consider credit policies. Absent such consideration, OCC claims should be given no weight.

ATTIX believes that revenue estimates due to ATTIX's position as default carrier are speculative at best. Indifferent customers are probably light users.

ATTIX notes that studies to calculate an "inferior quality adjustment" are based on private line surveys and cannot be used in MTS/WATS calculation. Due to the dynamic nature of the market, conclusions based on today's data cannot be considered of value in the future.

ATTIX states that a promised MCI examination of opportunity costs should be given no weight as ATTIX will have no opportunity for rebuttal.

ATTIX states that GTE's proposed shift of another $1.8 billion into the premium is outrageous and argues that it should be rejected out of hand.

ATTIX shares SBS's concern about the size of the USF and believes that the USF should be capped at $1 billion. If it is not capped, the Commission must modify the amount assessed on interexchange carriers. If no cap is developed, the USF will impose an economic burden on carriers reaching past current levels and will cause uneconomic bypass. ATTIX proposes that any USF over $1 billion take the form of a per line end user surcharge.

ATTIX agrees with Rochester that semipublic phones should pay end user charges.

ATTIX (Opposition to Motion to Strike)

ATTIX believes that SBS's motion to strike ATTIX's comments is based on allegations without foundation. Business views differ within AT&T. No conceivable harm could result from considering ATTIX's comments. SBS alleges no harm.

Arthur W. Brothers

Brothers states that required notice as to the effects of this Order on several companies was not provided and comments were not permitted. He believes that low-end bypass by homeowners will render the entire system inoperable. An alternative solution, a microwave license fee, is not considered.

Brothers also notes that true input from BOCs cannot be received until January 1984.

At the very least, Brothers states, the Commission should adopt a dual method of compensation with charges on all Commission microwave licenses.

Central Telephone (Centel)

Centel believes that the EAS requirements unnecessarily restrict the flexibility of a local exchange carrier in developing cost-based charges. The rules should establish a mechanism under which local carriers can bill and distribute revenues for jointly provided access.

Centel urges the Commission to reconsider § 69.103(a) of the Rules (pay phone) since many calls are not sent paid. Pay phone costs should be assessed on carriers on the basis of relative traffic.

Section 69.3(e)(3) prohibits carriers from participating in ECA TS tariffs while filing their own tariffs for billing. Centel believes these pools should be separate.

Centel notes that there is no explicit provision for end user charges on credit card. Centel proposes treating both like collect calls.

Centel believes that the reseller issue needs clearer statement.

Conversation time or minutes are not defined. Centel's interpretation does not correspond to separations. Centel proposes that actual billable minutes to the interexchange carrier be used.

Centel believes that § § 69.303 and 69.304 require CPE and inside wire allocations to dedicated access lines. Such an allocation would create uneconomic price signals.

Centel recognizes that costs will be incurred by preparation of access facilities if orders are cancelled. Centel urges guidelines to allow recovery of costs involved in planning and development of new facilities.

Centel believes that allocation of expenses and investment should be consistent with existing separations.

CompuServe

CompuServe is an enhanced service provider and has believed that it would be treated as an end user. Without notice or reasoned explanation, this status has been changed. The carrier charges would result in access charges at least six to seven times higher than those levied on end users. A sizable differential would remain even after the transition period.

CompuServe believes that treatment of enhanced service providers as carriers is a mistake and does not reflect the Commission's actual intentions. The Fourth Supplemental Notice did not discuss applying carrier charges to enhance services. The Order did not state that enhanced service carriers would be so charged.

Treating enhanced service providers as carriers would raise their rates more than any other group. The jolt is inconsistent with the notion of a transition. Enhanced service providers will permanently turn to bypass. Such providers would also seek to escape being labeled enhanced service providers. This will lead to the same problems that the Commission faced in Computer II.

CompuServe states that only MCI attempts to refute enhanced providers' legal arguments that they did not receive notice. MCI's argument is incorrect as notice was too general to meet Administrative Procedure Act requirements. Moreover, the Order does not explain why enhance providers should be subject to access charges.

CompuServe notes the advantage given to private systems and "underground" providers. The problem of identifying enhanced providers is non-negligible. Moreover, firms will have to be careful not to step over some regulatory line, subverting Computer II.

CompuServe recommends billing only the facilities' carrier. CompuServe notes that, if the facilities carrier pays an access charge, then there is no escape for enhanced providers.

CompuServe supports petitions filed by Tymnet, Telenet, and ADAPSO insofar as they are concerned with the improper imposition of carrier's carrier charges on enhanced service providers.

CompuServe states that business users use local facilities to originate and terminate interstate communications and that no one explains why enhanced providers are different.

CompuServe notes that such charges would result in double-recovery. Much of the traffic to enhanced service providers will be intrastate and hence not subject to the access charges established in the Order.

CompuServe supports those favoring carrier purchases of dedicated access on behalf of customers. The dedicated access line should appear on the bill separately.

CompuServe requests that Section 69.202(a) of the Rules be clarified to show that end user usage tariffs are voluntary.

If the Commission adopts the proposal to combine all private lines in special access, it should indicate that voice-related CPE and pay telephone costs should not be allocated to nonvoice services in special access.

Delaware Public Service Commission (Informal Filing)

Delaware notes that there is no mention of any Centrex provision in the Access Charge Order. Delaware is concerned that the majority of Delaware's Centrex business will convert to terminal equipment, eliminating much of the revenue that has been subsidizing local rates. Delaware proposes a per-trunk equivalent basis for assessing Centrex lines.

Discount Phone

Discount Phone petitions for reconsideration of the Pay Telephone End User Charge, apportionment of expenses related to pay telephones, apportionment of investment related to pay telephone, and other concerns relating to pay telephones.

Discount Phone urges the Commission to adhere to its intent to recover pay telephone costs from the cost causers. Discount Phone opposes replacement of the Pay Telephone End User Charge. The surrogate charge proposed by exchange carriers is easy to implement but violates the principle of cost causative pricing. Such surrogates are unfair to competitors and provide no incentives for cost control.

Discount Phone proposes three alternatives. First, interexchange carriers could collect an end user charge on collect, credit or third number billed calls. The exchange carrier would flag calls originating at pay phones. Second, a single averaged pay telephone end user charge could be created and charged by interexchange carriers. Third, exchange carriers could collect end user charges by coin for all calls. This third option would be especially attractive to companies having only coin pay phones.

Discount Phone notes that pedestals, booths, housing and all related installation investment in station equipment should be included in "appurtenances."

Discount Phone states that pay telephone lines are correctly assigned to the pay telephone element, that the portion of switching equipment necessary to support pay telephones should be specifically assigned to the pay element, and that pay telephone buildings or portions of buildings should be clearly identified and assigned.

Discount Phone states that some sales and advertising expense (especially charge-a-call advertising) can be identified and should be directly assigned to the pay element. It argues that the public telephone commissions expense is anticompetitive and should not be allowed. Since almost all billing takes place at a remote location, Discount Phone recommends a weighting of Revenue Accounting expenses. Pay telephone staff salaries and office expenses should be directly assigned to the pay telephone element. Relief and Pension should be assigned like General Office expenses.

Discount Phone also states that resellers should not be assessed access charges as this results in double billing, that mechanized calling card service (MCCS) costs passed on through carrier's carrier charges be recovered in the MCCS tariff, and that usage charges for collect calls be included in the interexchange carriers tariff for a collect call rather than integrated into the cost of doing business.

Discount Phone suggests that cities or states requiring emergency services should pay for them rather than expect the general ratepayer to do so.

District of Columbia Public Service Commission (D.C.)

D.C. believes that the flat per line charge unlawfully discriminates against Centrex users.

In D.C. a PBX system uses one line for every 6.25 lines used by Centrex. Centrex represents almost 41 percent of all D.C. lines. Inposition of an end user charge would cause abandonment of Centrex. This would result in a $24 million stranded investment in D.C.

D.C. submits that flat rate charges on Centrex are discriminatory since PBX users pay less for the same services.

D.C. does not concede that the Commission has the authority to impose its access charge, but believes Centrex modifications can be made within the confines of the basic structure by charging a Centrex end user charge calculated to simulate the charge on a similar PBX. In D.C. this would be 16 percent of a normal business line rate.

General Electric Information Services Co. (GE)

GE states that the rules that treat enhanced service providers like carriers would damage GE and other remote access data processing services and the nation. The rules could not be enforced except against arbitrarily determined providers. The rules do not recognize private use in these companies. GE states that double billing cannot be avoided if such charges are levied. The solution is to treat enhanced providers and end users.

GE states that these rules would increase its costs by $11 million per year. GE and similar companies exist because they can provide service better than companies can provide it to themselves. If rates exceed costs, customers would migrate to private or internal systems. Once customers build private systems, they are lost. Once they construct bypass for data, they will use it for everything possible. Alternatively, some customers will abandon data use, reducing their efficiency.

U.S. data services are worldwide leaders. While the bulk of the charge is transitional, such a charge could do irreparable harm to the industry.

The imposition of such charges would be inconsistent with Computer II.

Enforcement problems are severe because companies cannot be identified and because the same company may use communications privately. Enforceability must be considered. GE states that there is no basis for AT&T's assertion that identification is possible. No one has explained how the jurisdictional character of a service is to be determined.

GE notes that AT&T does not discuss calculation of the "appropriate credit to be used to avoid the double-counting problem." Moreover, the Act prohibits refunds or rebates. This would complicate tariffs.

The imposition of charges on enhanced providers is subject to almost certain judicial reversal.

GE believes that the rules should be refined. GE suggests that levying charges on facility-based carriers only is simplest and most rational. This solution would eliminate double counting and would not burden local carriers or end users.

GTE

GTE requests guidelines as to the application of "carrier" access charges. It cannot determine what constitutes a carrier. If enhanced service providers are to be charged, a workable definition of enhanced service provider is needed. What about a group of sharers? What if service provided to others is a trivial part of total service? How can the telephone company know?

GTE understands an intent to allow exchange carriers to file tariffs independent of the ECA but the EAS requirement appears to rule this out as a practical matter. Negotiations would be required among a large and different mix of carriers in all EAS areas. All carriers would be forced into the TS pool. Moreover, the EAS rules do not eliminate arbitrage. Compensation cannot occur unless carriers advise each other of the nature of usage. GTE recommends establishing a mechanism under which carriers bill and distribute TS charges, and file either joint ECA or separate TS tariffs with a requirement that carriers reciprocate in provision of interexchange carrier usage data for billing/revenue distribution. The entire cost should be covered by the access charge regardless of the end at which the IC is located. IC billing should be billed by carriers serving the POP. These carriers would distribute revenue on the basis of each local carrier's tariff charges.

GTE understands § 69.103(a) of the Rules to mean that end users cover interstate pay telephone revenue requirements. The vast majority of toll calls made from pay phones are credit card, third number, or sent collect. The result is prohibitively higher customer charges. GTE recommends treating pay telephones like intercept, allocating costs to interexchange carriers on the basis of total use.

GTE understands that all third party usage charges are to be assessed to the line billed. This is inconsistent with the treatment of other sent collect calls. This would require a costly billing coordination system and an additional division of revenue process. GTE recommends that third party billing and credit card calls be treated like collect MTS calls.

GTE understands § 69.104(a) to mean that the lesser quantity of loops associated with party service should be reflected in access charges. GTE intends to do so by applying the loop to customer ratio for each study area. In some cases this percentage is less than 1; if not, the single line rate will be used.

GTE understands that the costs of dedicated private line loops will either be included in the Dedicated Access Line element or the Special Access element depending on the associated CPE. Because telephone companies no longer have exclusive ownership of CPE used to terminate private lines, there is no reliable way of making this distinction. GTE recommends that all private lines be reclassified as special access, leaving only WATS lines in dedicated access. GTE notes that the proposed AT&T definition of dedicated access excludes certain WATS lines where these are switched at tandem offices. GTE proposes including all WATS lines.

GTE understands § 69.604(a) to require the ECA to bill and collect all common carrier line charges including any premium. Usage information would be needed, the local carrier already has a billing system and an ECA billing system is redundant and unnecessary. Local carriers should be allowed to bill and collect non-premium charges.

GTE understands paragraphs 190-191 and n. 63 of the Order to indicate that exchange carriers will receive adequate information about interexchange customers. It expects that some interexchange carriers will not provide such information. It recommends that exchange carriers be able to assess a surrogate charge to interexchange carriers that are unwilling or unable to provide usable end user information. GTE urges elimination of the requirement that rule waivers be sought for such surrogates.

GTE urges compensation from interexchange carriers based on usage without regard to billed minutes. Use of billed minute measures results in subsidizing interexchange carriers. GTE states that the BOC minute definition would leave exchange carriers indifferent between interexchange carriers. Billable minutes would make exchange carriers dependent on interexchange carriers' data. GTE states that, if the exchange carrier provides a connection, it should be compensated. GTE proposes charging ATTIX for time used punching in a credit card number or talking to the operator. Regardless of access inequality, GTE states that if the exchange carrier undertakes costs then it should be compensated.

GTE understands § 69.102(a) to assess dedicated access line charges on end users, but believes the intent to be that ICs will be able to place orders for end users and receive billing. GTE believes that the party placing the order (whether carrier or end user) should be charged for special access as well.

GTE understands a Commission intent to define the entry switch as the first wire center where switching is actually performed. It would be difficult to implement the rule because of BOC waiver requests and the mixture of BOC/independent territories. GTE recommends that dedicated transport should extend from the POP to the serving office. By such redefinition, only one exchange carrier would provide Dedicated Transport in any geographic area.

GTE urges clarification of the Order to deal with Centrex. GTE supports the trunk equivalent approach to Centrex.

GTE also proposes a number of specific changes in cost assignment.

GTE Letter from Chairman Brophy

Brophy congratulates the Commission for the general thrust taken in the Order. Certain modifications, however, are needed to encourage full and fair competition. Brophy's concern is that the rules could have the unintended effect of undermining competition. Until equal interconnection is available an appropriate differential is needed.

Brophy points out that the net result of the rules is an increase in OCC charges and a decrease in AT&T charges. The gap is reduced from 60 percent to 25 percent with no change in access quality.

Brophy recommends that $1 billion of NTS costs be assigned to the carrier's carrier pool with the remaining NTS costs not allocated to end users assigned to AT&T on a nonusage basis. This proposal reduces the differential but more closely approximates current disparities and eliminates the immediate OCC cost increase.

Brophy believes that these changes would not upset the basic structure of the Order, but would encourage competition.

IDCMA

IDCMA doubts the need for and wisdom of proposals to convert dedicated access to special access as proposed by AT&T. IDCMA seeks to assure that this proceeding does not foreclose an end user from securing directly from exchange carriers the capability to reach an interexchange carrier point of presence.

IDCMA notes that § 69.4(b) of the Rules could be read to indicate that special access can be provided only to carriers. IDCMA urges the Commission to make clear that the designation of a service element is not intended to foreclose a user from ordering any transmission capacity directly.

IDCMA is concerned that AT&T's proposal may prejudge decisions regarding AT&T's future role as an end-to-end provider. This issue is in dispute and is more appropriately judged elsewhere.

Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell, Wisconsin Tel. (Midwest Regional)

Because the Centrex issue is so important Midwest Regional requests expedited consideration.

Centrex provides many features for very large and small users that would be difficult to duplicate. Centrex is the only service which operating companies can offer in 1983 which is competitive with PBX and key systems and is a major revenue producer. PBX vendors are using the $4.00 charge as a marketing tool.

Many Centrex customers are governments, educational institutions, or health care organizations whose spending is being curtailed.

If Centrex users switch to PBX services, the NTS investment no longer recovered from Centrex will have to be recovered from remaining users. Remaining customers will be hurt.

Illinois Commerce Commission

Illinois states that the industry is appropriately characterized as consisting of three parts, the access loop, the public switched local distribution network, and toll service. Jurisdictional boundaries, however, are based upon the end-to-end concept. Illinois contends that there exists a fundamental incompatibility between the access charge philosophy and the regulatory framework chosen to implement it. Unless jurisdictional lines are redrawn to comport to the industry structure, consumers will be adversely affected.

Illinois notes that the Order will affect the development of intrastate pricing. Illinois suggests that interstate and intrastate charges should be compatible. The cost of access does not depend on a final destination. The per minute traffic sensitive separations costs are identical for interstate and intrastate calls. Further, exchange carriers would be burdened with the costs of distinguishing interstate and intrastate access if the charges differ.

Proper transport charges would require a comprehensive evaluation of each applicable tariff in relation to the others. Such a review is frustrated by a continuation of separate tariff responsibility over common investment. Illinois notes that its attempts to introduce cost-based prices may be frustrated by the access charge prohibition of disaggregation below the study area level. Dual regulation may unnecessarily frustrate state ratemaking prerogatives. In sum, Illinois argues that continuation of the current jurisdictional framework is inconsistent with elimination of discrimination.

The problem with access charges is the need to coordinate state and interstate rates, but no law requires regulatory cooperation. Further, the Docket 78-72 rules require regulatory duplication, increasing the danger of state actions to frustrate the Commission's objectives.

Illinois urges the Commission to delegate to the states implementation of an access charge. States could consider total revenue and costs and are more familiar with the circumstances. In the alternative, states could be given an option. Illinois argues that the prior rejection of delegation was based on the abandoned concept of end-to-end monopoly and should be reconsidered.

Lexitel

Lexitel believes that the Commission should not let AT&T deadlines control policy. Lexitel notes that January 1, 1984, is an AT&T goal not mandated by the Commission or judicial order. The result can be undue haste at the expense of competitors. Lexitel urges that it is more important to get it right than to get it done according to AT&T's schedule. Lexitel states that the Plan should not unfairly position the now dominant carrier AT&T. Lexitel points out the double payment required of resellers and notes that this is contrary to past Commission Order. Lexitel believes that the resale carrier should pay reduced access charges for each minute of resold MTS/WATS-type service that is already paying NTS access charges. Lexitel suggests a rtheced BOC charge reflective of the double charge. The reduction would be the amount per minute already paid by the resold services.

Lexitel states that, put simply, the AT&T premium is really a fraction of the $1.4 billion. Furthermore, there is no reasonable evidence to support the $1.4 billion.

Lexitel states that the premium is too small and is phased out in ways unrelated to the elimination of inferior access. Lexitel notes that the immediate effect of the premium would be to force OCCs to raise their rates while allowing AT&T to reduce its rates without providing any improvement in access quality. The result is rate churning which is antithetical to the goals of the Plan. Lexitel also argues that the premium discussion is conclusory and not based upon any record.

Lexitel states that access pricing and access quality cannot be separated and that until better interconnection is made available the current relationship should be retained. Lexitel believes that using the ENFIA rates for calculating AT&T/OCC relative prices is appropriate legally and on policy grounds.

Lexitel agrees with MCI's point that OCC and AT&T conversation minutes are measured differently and that AT&T does not count its setup costs while OCCs do. OCC billed minutes are the closest known approximation to AT&T's conversation minutes. Lexitel urges that OCC billed minutes be used. Alternatively, some holding time to conversation time ratio must be mandated.

Lexitel states that equal access is speculative at this point. Lexitel notes that Western Electric, which manufactured most BOC switches, will remain owned by AT&T and that AT&T will have little incentive to provide timely equal access since the plan reduces the premium under a calendar schedule.

Maryland People's Counsel (MPC)

MPC believes that the decision is based on insufficient evidence and strays beyond the FCC's regulatory authority.

MPC urges the Commission to clarify its discussion of costs.

MPC believes that the Commission's treatment of bypass is deficient.

It is unlawfully discriminatory to charge customers who do not use interstate services for interstate access. This results in subsidization of interstate callers and carriers.

The proposal adopted was not subject to comment. MPC believes that the Order intrudes into State ratemaking authority.

MPC states that the Commission concentrated upon economic efficiency and competition and overlooked the more important marketplace of ideas, information, and truth. To the extent that the disenfranchised are denied access to the electronic public forum, the Order tears at the fabric of free society. This strikes at the First Amendment.

MCI

MCI believes that the Commission should focus only on unworkable parts of the Order. MCI submits that the Commission's greatest concern should be the marked transient increase in OCC charges. This part of the Order undermines competition. Possible solution include: a cap on OCC charges, maintaining the existing differential, freezing OCC minutes/line effective December 22, 1982; elimination of OCC and private line contributions to common lines, or increase in the premium to accurately reflect opportunity cost.

MCI believes that the FCC should reaffirm its decision to impose a premium equal to the opportunity cost of perferred access. The opportunity cost concept is an important part of economic analysis.

MCI states that, if premium access were generally available, OCCs would all subscribe. Without the choice, equal prices could destroy competition.

MCI states that the present premium is roughly $7 billion but limited entry suggests that this is inadequate. MCI states that AT&T's objection to the premium is a restatement of its view that a service should be provided by a monopoly. If $7 billion were excessive, AT&T would have offered ENFIA type services.

MCI states that AT&T is granted a monopoly for rotary and inward WATS customers with interstate revenues of $11 billion. Such a market would be worth $3 billion in profits to MCI. This is only the tip of the iceberg. Noise and many digits also are important. If the typical customers were willing to pay an additional quarter/call to avoid these costs, the premium would be worth over $1 billion more.

Billing differentials, even after 1984, remain important. MCI notes SBS's estimates of AT&T's costs of doing its own billing. MCI will incur $14 million higher uncollectibles, $15 million for network enhancements, and $20 million for unnecessary marketing expenses. Additionally, MCI will forgo profits of $22 million for unbilled calls and at least $186 million for price reductions necessary to offset excessive digits, noise, etc.

MCI thus calculates its costs to be at least $257 million. Total OCC costs would approximate $514 million/year. This would translate into a $10.3 billion premium if applied to AT&T.

Therefore, MCI suggests, at a minimum, that the premium include CPE, inside wire, and the residual common line charge. MCI believes that USTS seriously underestimates the opportunity cost of premium access.

MCI is concerned that the transition plan produces unnecessary transitional dislocation. MCI states that the transition plan would saddle MCI and the other OCCs with a sudden massive increase in their access costs with nothing in return. MCI states that in any reasonable transition plan, rates should move in a consistent direction. The particular transition plan is inconsistent with the Commission's intent to preserve an opportunity for fair competition. An alternative means of transition is to adopt Commissioner Jones' proposal to maintain the existing percentage differential between ENFIA and the AT&T levy. Yet

another is the same OCC cap as is placed on end users. Since it is difficult to detect differences between carriers and end users, this approach has advantages.

MCI believes that those petitioning for special treatment for resellers or enhanced service providers fail to understand the Commission's intent. Since they originate or terminate interstate or international communications, they have had fair warning. There is no discrimination but there is a possible double billing problem. Exchange carriers should be given flexibility to charge at either the exchange side or the interexchange side of such resellers.

MCI agrees that the plan may cause disruption. The Commission should seek to minimize this distortion by minimizing the allocation of common line NTS costs to interstate and foreign services that receive line side interconnection.

MCI believes conversation minutes should not be used for competitive carrier charges. Rather, the Commission should freeze the number of minutes per ENFIA line at the level now lawfully in effect.

MCI states that virtually all parties believe that imposition of end-user charges on competitive carriers' customers will prove unworkable. The Commission could apply charges on line side connection equal to dedicated access, or apply a surrogate like that imposed on collect MTS to MCI calls. MCI believes that the competitive carrier dedicated transport charge should be equal to the dedicated line charge. Under this approach, no end-user charge would be levied upon their customers.

If a surrogate is to be used, MCI believes that it should be collected on an equal per-minute basis from all callers.

MCI states that the situation is analogous between this Order and the Rate of Return Order and that the 6-month notice provision cannot be voided.

MCI believes that the ECA should be eliminated. An ECA limited to exchange carriers appears to pose antitrust problems.

Petitions asking for reversal of the end-user charge or for extending the USF to traffic sensitive costs are inconsistent with cost-based pricing and should be denied.

MCI agrees that the treatment of pay phones should be changed but disagrees with the imposition on carriers on the basis of use. MCI supports the Rochester proposal to charge end users.

MCI opposes the request that interexchange carriers notify exchange carriers concerning billing by July 1, 1983, and give a six-month termination notice. MCI needs knowledge of price before it can commit itself.

MCI believes that the Commission should consider changes requested for Centrex, EAS, and party-line service. With respect to Centrex, MCI supports moving in the direction of costs.

MCI supports giving exchange carriers flexibility in billing private access lines, provided that rates do not vary depending on who is being billed.

MCI believes that the Commission must bring its traffic sensitive rules into line with the MFJ. It must also avoid massive increases in traffic sensitive costs until equal access is achieved.

MCI states that Alaska does not document its claim to need traffic sensitive support.

MCI believes that deviance from cost should be carefully specified and delineated. MCI believes that public funding should be used for any subsidy required.

MCI requests that the Commission consider effects of disparate state and federal access policies in its Joint Board proceeding. The extent of averaging may ease the Commission's review process but make it difficult to support consistent state and interstate carrier usage charges. MCI believes, however, that such changes might better be deferred and subjected to further rulemaking. MCI does suggest, however, that the Commission require informational filing of intrastate access tariffs.

Michigan PSC

Michigan asks that the entire burden of access costs be placed on interexchange carriers or that the Commission reduce the subscriber fixed charge. Michigan states that the Court has stated that the access charge proceeding is contrary to the ends sought in divestiture and that there is no basis for bypass concerns or for the belief that long distance carries subsidize local rates. Michigan believes that, even if an end user charge is required, the record does not support one as high as that imposed.

Michigan urges the Commission to adopt suggestions to assess Centrex users based on PBX trunk equivalents. Failure to do so will strand $100 million in investment in Michigan.

Michigan urges that the Commission eliminate its party-line rules and require each customer to pay the same access charge. Costs of party-line service are at least as high as single-line service. Michigan believes that party-line service reduces call completion, decreasing network efficiency.

Michigan contends that the EAS rules serve a useful purpose. Costs within an EAS area are the same regardless of where the EAS network is entered. Failure to require EAS averaging will lead to constant undercutting. On reconsideration the Commission should address allocation of revenues.

Mid-Atlantic Regional Bell

Mid-Atlantic is concerned about the especially pronounced impact of the end user charge if applied to Centrex users.

Centrex service is highly competitive with PBXs. A $4.00 per line charge would put Centrex at an unfair disadvantage. The result would be a shift away from Centrex to PBXs despite the efficiencies of Centrex. A trunk equivalency charge would produce Centrex revenues as high as would be generated if they switched to PBXs.

The shift to PBXs would require new COE investment to provide Direct Inward Dialing trunks and reduced use of embedded BOC investment. Mid-Atlantic also believes that the shift could have significant negative financial consequences.

NATA

NATA believes that the access charge should and must be applied to each Centrex C.O. main station or line. NATA supports UTCC and opposes the eight petitions to the contrary. NATA does not object to the relief sought by Rochester concerning Centrex.

NATA argues that the proposals are entirely inconsistent with the purpose of access charges and would undermine the cost-based pricing scheme. They are also inconsistent with Computer II and the MFJ. If Centrex C.O. is to remain a regulated, tariffed, exchange service, it cannot be treated like CPE. Finally, there is no evidentiary basis for selecting a Centrex formula.

NATA agrees that much Centrex loop plant is used for intercom, but believes that this is irrelevant. The full cost of each Centrex C.O. loop is included in the separations rate base.

Pricing Centrex on the basis of PBX equivalents provides a wrong pricing signal. If cost based pricing leads to PBX purchases, the result is more efficient use of the network.

NATA believes that there may be some short-term problems if customers rapidly shift from Centrex to PBXs, but maintains that continuing false price signals could cost even more. New facilities will continue to be built. Efficient pricing frees up plant to accommodate growth in demand for exchange access services.

NATA observes that the term "stranded investment" is misused in an attempt to stampede the Commission into retreating from its attempts to make more rational the cost basis for telephone service. NATA notes that BOCs have argued before state commissions that 100 percent of central office equipment and 80 percent of OSP associated with Centrex are reusable.

NATA states that no data have been provided to support statements concerning reuse of Centrex C.O. plant. NATA finds the entire premise that abandonment of Centrex C.O. investment is a serious problem to be mere speculation. There are no demand studies showing cross-elasticities between PBXs and Centrex C.O. There are no surveys of attitudes and no evidentiary inquiry into operating advantages of either system.

NATA observes that, unless Centrex users pay their costs, someone else must. This would be unlawfully discriminatory.

NATA notes that PBXs are not regulated services. The regulated service for which the Act prohibits discrimination is the access line. Failure to charge the same price constitutes unlawful discrimination.

NATA submits that, if the Commission is inclined to adopt a PBX equivalent formula, further hearings should be held.

National Data Corp. (NDC)

NDC urges the Commission to ensure that the transitional surcharge does not unfairly burden 800 service. It is implicit that transitional surcharges should be separately computed for each applicable service and not burden one service with costs attributable to another service. The Commission should make clear that 800 service users should not be burdened with costs attributable to other services.

Because of the flexibility granted carriers, NDC cannot estimate the transitional surcharge. NDC is concerned about the lack of a surrogate cap. Such a cap is dictated by the Commission's rationale and its lack unfairly burdens users of services subject to transitional surcharges.

NDC finds the Ad Hoc proposal intriguing if multi-exchange open-end services are not subject to a surrogate.

The USTS proposal to eliminate surrogates does not resolve NDC's concerns.

NDC's concerns are hightened by petitions to extend the surrogate. NDC believes that such extension will exacerbate the potential for burdening 800 service with costs attributable to other services.

Pacific Telephone and Telegraph (Pacific)

Pacific requests reconsideration of Sections 69.104(a) and 69.203(a) of the Rules, relating to Centrex. Pacific notes that the end user portions of the Rules could be interpreted as applying discriminatory treatment to Centrex, i.e., make Centrex users pay an end user charge.

Pacific's Centrex systems make a contribution to Pacific's operations. If the end user charge is applied, Pacific expects to lose 90 percent of its Centrex customers. This would reduce contribution and result in stranded investment. In California, this would result in a $1.00 increase for all business and residence access lines. Centrex prices already exceed costs. Pacific's recommended correction is a sliding scale that moves to PBX equivalency.

Pennsylvania PUC

Pennsylvania notes that no language specifically provides for Centrex service. Even with rate stability Bell of Pennsylvania is projecting competitive losses. Literal application of a Centrex end user charge would affect the viability of Centrex and require local rate increases. Pennsylvania perceives the added problem of stranded investment of central office equipment. Pennsylvania proposes that operating companies establish an end user charge that equates to trunks as trunks would be used by PBXs.

Rochester Telephone (Rochester)

Rochester submits that the Order adopts rules that are deficient or unclear in their treatment of six areas. EAS, pay telephone, COE-4 equipment, Centrex-CU; end user usage charges, and the ECA.

Rochester believes that the Commission has adopted an overall policy based on the sound premise that it should accommodate its concerns for universal service by bringing rates to cost.

Rochester notes that a local carrier with EAS arrangements can prevent its associates from filing their own carrier access charge tariffs. Rochester submits that the public interest does not require this. EAS arrangements are local in nature. It bears no necessary relationship to access. EAS can be provided without interexchange access and access can be provided without EAS. RTC also believes that the Order is in error in stating that this requirement is needed to assure that some access charge be effective in all areas. Without this requirement, carriers could file cost-based tariffs. The two local carriers could each bill the interexchange carrier for that access service provided.

Rochester submits that the pay telephone rules should distinguish between public and semi-public pay phones. There is no reason not to apply a flat fee in the latter case. Rochester notes that pay phones do not have the same relative usage as do other phones, so revenue requirements do not match relative usage. Further, collect and third party calls would not contribute. Only 22 percent of Rochester's pay phone interstate traffic is sent paid. The average Rochester phone only originates about three sent paid calls/month. Bypass is a significant threat. To avoid this result, the Commission should allow pay phone revenue requirements to be recovered through flat end user charges paid by all users. Rochester incurred its huge pay phone costs to provide a local emergency service; these costs should not be recovered from interstate sent paid users.

Rochester notes that Category 4 COE is assigned to interstate even if no carriers purchase billing services. It should be reassigned to the LS 2 category of local switching. This automatic message recording equipment must be imployed to provide the detail necessary for the billing of carrier access charges.

Rochester believes that Centrex-CU should be treated as if it involved the provision of party lines. An access charge should be assessed for each trunk to the central office with the charge divided among the stations receiving service.

The language of the rules is in conflict with the text of the Order which makes it clear that carriers have the option of filing a flat end user tariff.

The language of the rules seems to exclude Rochester from membership in the ECA since Rochester will contribute to, but eventually receive nothing from, the pool.

Rock Hill Telephone

Rock Hill seeks clarification on messages between Rock Hill, S.C. and the Charlotte, N.C. exchange of Southern Bell and other points in the Charlotte LATA. Rock Hill asks which authority is to have jurisdiction over MTS/WATS tariffs applicable to these messages and whether associated costs are to be recovered through access charges.

Rock Hill also requests clarification over the status of messages between Rock Hill and South Carolina points in the Charlotte LATA and non-Charlotte LATA South Carolina points.

Rock Hill asks whether an end user charge is applicable for both MTS and WATS sent paid messages, if an end user charge is otherwise applicable. Rock Hill asks who is to access the end user charge and, if the end user charge is to be billed by the exchange carrier, what is to be its source of information.

Roseville Telephone, Anchorage Telephone Utility, Northern States Power (Independent Alliance)

The Independent Alliance asks for reconsideration of end user charges and the decision not to require nationwide pooling for all access costs. The Alliance states that the Commission failed to give notice of its intention to place access charges on end users. This was not considered in the Second or Fourth Supplemental Notices. Independent Alliance submits that post hoc assumptions as to the ultimate bearer of access assessments fall short of the standards set forth in the APA. Discussion in comments does not resolve the notice problem. The Independent Alliance asserts that adequate justification for imposition of flat rate end user charges is absent. The Commission ignores the fact that the cost causer is the interexchange carrier.

Independent Alliance also states that the rationale for abandonment of a uniform nationwide access charge plan is absent. The Commission has abandoned preservation of universal service in a precipitous burst of injudicious zeal toward achieving a marketplace "economic" use of facilities.

The Independent Alliance states that flat rates could be imposed on carriers.

Independent Alliance believes that even interexchange carriers have expressed reservation on the end user charge. The problem is a failure to impose charges on the interexchange carrier—the actual cost causer.

Independent Alliance supports extension of the USF to traffic sensitive costs.

Independent Alliance opposes revision of the EAS rule. Without such a rule, entry would take place in the cheapest area and the other areas would be served by EAS arrangements.

Independent Alliance proposes defining extended area arrangements at those providing toll-free access.

Independent Alliance proposes that the highest cost area would charge carriers in the lower cost area a surcharge for the opportunity to have toll free access. In the alternative, carriers coming into the lower cost area would only be able to access that area but those entering the higher cost area could access all areas.

Independent Alliance submits that billing and collection should be subject to a separate tariff to allow flexibility.

Rural Electrification Administration

REA states that although the overall structure of the new system is not tailored to meet the special needs of rural system, it can be modified to treat rural areas fairly.

REA interprets § 69.104(c) of the Rules (party line rule) as allowing loops used for party line service to be aggregated and divided by total lines, subject to the $2 minimum. By adopting this rule the Commission creates uneconomic incentives for party line service. REA states that it costs more to convert to multiparty than to provide one party services, that party line subscribers cannot receive many services, that OCCs cannot be granted access to party lines, that party line costs differ, and that multiple grades of party service may exist.

REA recommends that § 69.104(c) be deleted and that carriers be granted flexibility to handle party lines as they wish.

REA recommends mandatory pooling of traffic sensitive access costs to keep rural toll rates low. Absent such a decision, REA states deaveraging is likely to result from this docket.

REA states that higher rates resulting from deaveraging would threaten universal service. Over two-thirds of the REA companies would have to more than double rates.

REA believes that mandatory pooling of traffic sensitive costs would promote interexchange competition by keeping rural people on line, increasing market size, and by allowing rural companies to purchase new central office equipment.

REA believes that keeping people on line benefits the nation; funds coming from everyone would benefit everyone.

REA states that § 69.605(c)(2), which states that average schedule companies must pool all tariffs, is overly restrictive. Currently companies may be on average schedule for some elements and not others. This should continue to be allowed.

REA believes that public comment should be sought on the ECA Board.

Rural Telephone Coalition (RTC)

RTC had doubts concerning the departure from past practice, but will attempt to improve the prescribed structure.

RTC does not believe that the Commission has adequately addressed the impact of cost-based transport tariffs. RTC is concerned that interexchange carriers will deaverage toll rates as a result of high class 4 to class 5 toll connecting link costs in rural areas. RTC believes that it is unclear whether SBS opposes the concept of supporting high cost toll links and states that no one has ever suggested that support mechanisms be without limit. RTC states that toll link support would not necessarily favor AT&T. Cost-based pricing might thwart competitive entry into high cost areas. The Commission cannot ignore the need for a universal toll support mechanism.

RTC seeks assurance that the Commission does not intend to force average schedule companies to perform cost studies and to move to cost. Further, presently average cost companies should be free to concur in average schedules. RTC is also concerned about the requirement that companies owned by a company that performs cost studies must also do so. RTC disputes the concept of denying average schedule status on the basis of parent or sister company status. Adding the administrative burden of performing cost studies should not be required. The rules might impair the attractiveness of an average schedule company as a merger candidate or acquisition.

Companies that settle on an average schedule have the option to settle on the basis of cost for line haul. Under the Order these companies would not have the ability to use actual cost

for line haul unless they abandoned average schedule. RTC seeks an appropriate revision to allow average schedule companies to settle for cost for line haul.

RTC believes that the Commission has adopted a party line charge rule that will create uneconomic incentives because it has not identified the cost difference between the types of service. RTC believes that carriers should have the flexibility to develop appropriate charges. The division process specified by the Commission does not produce a cost ratio properly related to actual cost differences. Party lines do not cost less in proportion to the number of subscribers sharing them. Depending on how party line service is offered, it may actually cost more. The rules provide false signals to purchase party line service. Further, party line service cannot provide many services or equal interconnection.

RTC proposes spreading pay phone costs on the basis of usage in the area. If an OCC does not operate in that area, it does not pay. RTC states that its proposal is the simplest. It notes that the Commission has not yet decided whether to promote pay telephone competition.

RTC believes that all sent collect calls are essentially the same and should be treated the same. There should be no difference between collect and third party calls. The transitional surcharge appears to be the appropriate recovery mechanism. Credit card calls should also be treated as sent collect.

RTC believes that carriers should be able to file their own billing tariffs and still join the ECA tariff for other TS cost recovery. Such a result appears consistent with the intent of the Order. RTC requests that the Commission amend § 69.3(e)(3) of the Rules to allow late notice. RTC also believes that interexchange carriers should be required to commit themselves early.

RTC states that exchange carriers did not know that rates would be set when they opted to join the ECA. Likewise, interexchange carriers must let exchange carriers know whether they will use billing services to allow development of rates. It believes that SBS misconstrues the "bottleneck" concept in calling for regulation of billing. Since billing is not essential for service, it is not a bottleneck.

RTC believes that the carrier's carrier USF element can, if large enough, allow growth of competition without making rural users pay without any benefit.

RTC believes that ADCU misunderstands the Order insofar as the USF is concerned.

RTC believes that the high cost problem is appropriately a national matter.

RTC believes that the ECA plays a vital role. RTC believes that the ECA meets past MCI concerns, and is open and fair.

RTC submits that, in view of the failure of anyone to show a legal or procedural problem with the USF, the fund must be affirmed as written.

RTC believes that the Order, with respect to extended area arrangements, raises considerable problems. It is not clear what definition is associated with extended area service. RTC believes that Sections 69.3(e)(8) and (9) unnecessarily restrict local exchange carrier flexibility and should be deleted. RTC proposes that exchange carriers be allowed to develop appropriate rate structures. The concept that joint rates in a multi-carrier EAS area are an exception to disaggregation below the study area should be retained.

Satellite Business Systems (SBS)

SBS supports the basic thrust of the action but believes that the transition toward equal access requires reexamination. Access charges arising from the Order will seriously inhibit the continued development of competition until fully equal access is achieved. SBS believes

that the deficiencies can be remedied without upsetting Commission goals or giving any carrier an unreasonable or uneconomic advantage.

SBS estimates that the plan would increase its access costs by between 70 and 100 percent. AT&T's access costs will fall by over 40 percent, despite failure of the Commission even to begin a technical examination of unequal interconnection. The differential narrow's despite years that remain before significant improvement in access is offered. SBS notes the fear of churning expressed in AT&T's Centrex proposal and wishes to extend this concern to the premium.

SBS notes that the Commission's premium charge is based on an unrelated surrogate. It believes that there are reasonable surrogates. The Commission justified narrowing in the discount because superior interconnection is available, but ENFIA–C connections are of limited availability, and remain inferior. To encourage competition, an access charge differential above AT&T's value of superior access is desirable, but SBS believes that competition will grow even if only a fair value is charged AT&T.

SBS states that AT&T would pay all but $56 million of the premium even if there was no premium. Discrimination in the traffic sensitive area, compared to the AT&T waiver, increases OCC charges by $30 million, resulting in a net AT&T premium of $26 million. The Commission should investigate the actual value, not make arbitrary judgments.

SBS states that the four-year transition is also arbitrary. Promulgation of standards and annual review of progress is required.

SBS agrees with the premium concept. SBS attempts to design a proper premium based on ENFIA's inability to use rotary phones, inability to provide specialized services, costs of network enhancements, high uncollectibles, customer enhancement costs, and AT&T's designation as default carrier. The estimated potential impact on AT&T's designation as default carrier. The estimated potential impact on AT&T's 1982 revenues is $7.9 billion or $1.35 billion 1982 profits. $1.35 billion is a reasonable proxy and far exceeds the actual $26 million.

SBS notes that each OCC arrived at a somewhat different premium recommendation, but that any of them would allow appropriate differentials. So long as the discrimination in access quality remains, the Commission has a responsibility to prescribe a reasonable differential.

SBS states that the quality differential reflects years of anticompetitive behavior. AT&T does not dispute that it does not receive superior interconnection; it merely disputes the OCC measures and suggests equal charges for unequal access.

SBS agrees that the premium is not cost based but states that, until it has an option, it should pay less. The network was designed, at ratepayer expense, to favor AT&T. AT&T should pay for this.

SBS disagrees with AT&T's assertion that OCCs do not use ENFIA C. It has found their quality lower than expected, much inferior to AT&T access, and their availability limited.

SBS denies AT&T's claim that OCC measures of the AT&T advantage are inaccurate, in fact they are often conservative. An adjustment to reflect increasing tone penetration is reasonable but small. SBS states that tone generators will impact calling. SBS notes the need for multiple tone generators for extension phones and based its calculation on the same $25 figure claimed by AT&T.

SBS notes, for example, that it could not offer the advertising advantages of an 800 service because its phone numbers differ and some users would be subject to a toll charge. Finally, only tone phones could complete the call.

The yo-yo effect on OCC charges whereby OCC rates will first rise substantially and then fall, cannot be justified. SBS proposes that the current ENFIA differential be retained. The differential can be reduced with reductions in carrier access charge revenue requirements, and reduced after 1984 with the development of equal access.

SBS notes that the MFJ equal access requirements do not apply to independents nor to many BOC offices. The Commission can immediately institute a long overdue proceeding to develop technical standards. Alternatively, the premium write down could be tied to actual progress toward equal interconnection.

The TS plan might be reasonable if all carriers had equal interconnection. As it is, the plan penalizes OCCs for AT&T's historical monopoly design. OCCs should be provided access through toll connecting trunks. During the transition, non-cost based OCC differentials should be allowed. SBS states that the grant of AT&T's waiver petition would leave inequities in place for independents.

SBS believes that subsidies other than a small universal service fund should come from the Treasury. SBS points out that Alaska has the highest per capita income in the country and argues that there is a limit to the subsidy that any area should receive. SBS believes that only narrow targeted subsidies are legal or good policy. SBS observes that even a transitional recovery of NTS costs on a minutes of use base is inefficient. By setting a fixed minutes of use value on reconsideration, the Commission can mitigate the disincentives to use local plant in an uneconomic manner.

SBS states that AT&T and Centel have proposed a definition of conversation minutes that disadvantages OCCs since OCCs do not receive ANI. SBS believes that billed minutes should be used or, at least, conversation minutes should include the actual time from call completion until disconnect.

SBS supports SPCC's proposal to add the end user usage charge to AT&T. The Commission, however, could eliminate the mover and permit only a flat end user charge.

SBS objects to any possible surrogate charge. If an end user usage charge is retained for OCCs the Commission should require OCCs to provide the exchange carrier the needed information on subscribers and length of calls otherwise obtained through ANI.

SBS opposes reseller and enhanced service provider exemptions. Although some vendors may be deregulated, none should be artifically favored. Such an exemption would force facility carriers to enhance and to establish resale subsidiaries. The Commission's equal treatment policy should be retained.

SBS objects to AT&T's proposed differential charges for trunks and lines since no cost differences have been shown. It is consistent to allow cost-based OCC access pricing and opportunity cost-based AT&T access pricing since OCCs have no choice while AT&T does. Once equal access is available, all access should be cost-based.

SBS believes that the three months for review of tariffs are insufficient. The Commission can retain the status quo for long enough to allow more complete consideration. SBS supports those urging at least a six-month notice.

SBS believes that local company billing is a bottleneck service and should not be permitted to earn monopoly profits.

SBS agrees that non-recurring charges are appropriate in many cases but states that such charges should not be used as a "two-tier" pricing mechanism to recover a substantial amount of the cost of a facility at the time of installation. They are appropriate to cover installation expenses, not properly capitalized expenses.

SBS agrees with Centel that cancelled orders should be billed to carriers rather than local customers but states that termination charges should generally cover such costs.

SBS agrees that pay telephone costs should not be recovered only from sent paid calls. AT&T's alternative, however, discriminates against OCCs since OCCs typically offer none of the credit card, collect, third party, In WATS, or similar calling arrangements because of their inferior access. SBS recommends that the costs of pay phones capable of placing OCC calls be allocated among carriers on the basis of relative use of those telephones. A sample would be sufficient until equal interconnection is available.

SBS believes that giving states control over implementation would be bad policy. This would result in no coherent national policy. The solution to the problem of different access charges is legislation giving jurisdiction over all interexchange communication to the Commission.

Southern Pacific Communications Company (SPCC)

It has become distressingly apparent to SPCC that the access charge plan, as adopted, will not promote the objectives of competition, reasonable transition, narrowly focused subsidy, and nondiscrimination. Until such time as equal exchange access is generally available, an appropriate price differential is needed. The access charge plan would eliminate or vastly reduce the past differential. This differential would fall from 57 percent to 19 percent. There would be a 165 percent increase in transport costs.

SPCC notes that the premium charge established in the Order is small, rapidly diminishing, and does not reflect the minor improvements in access quality that are likely to be forthcoming. The reduction in discount contradicts subsequent ENFIA decisions and the Order itself.

SPCC believes that AT&T's claim that ENFIA B and C are appropriate yardsticks for evaluating the premium is faulty. ENFIA B and C are not generally available. ENFIA B can be used to originate calls at only about 18 percent of AT&T's end offices. ENFIA C involves one-year delays. Also, these do not represent substantial improvements over ENFIA A. Differences in ENFIA A–C and ENFIA B arrangements preclude mixing. Because ENFIA B is not generally available, the rotary dial access is of little use. SPCC notes that tone generators cost money and are only needed because of inferior access. OCCs must compensate by lower rates. SPCC notes that rotary availability is not universally available even with ENFIA B. Since SPCC cannot use ENFIA B, it should be excluded from consideration. ENFIA C falls short of toll standards. Finally, independent companies do not offer ENFIA B–C. The local call charge must also be recognized in AT&T's premium.

SPCC recommends that reduction of the premium be tied to access quality. A Commission proceeding is needed to determine what equal access is. Cost allocation should correspond to quality. SPCC recommends delay in implementation of access charges. The Commission has authority to prescribe interim arrangements.

SPCC argues that an approach analogous to NTS payments would be to levy a premium transport charge on AT&T.

SPCC argues that its cost of inferior access per ENFIA per month, including added equipment costs, uncollectibles, the lower prices that must be charged, the fact that rotary dial subscribers cannot reach them, and AT&T's preselection as the default carrier total $484 per month. This translates into a 4.84 cent/minute disadvantage, compared to the 1.54 cent/minutes established by the Third Report and Order. This differential should be weighted by the percentage of subscribers who do not receive equal access. SPCC also argues that a lump sum differential will cause erratic and unpredictable changes in the differential.

SPCC argues that access arrangements that it receives are less restrictive and should, therefore, be priced lower than those required by AT&T. The greater is the flexibility provided the BOCs to route SPCC's traffic over underutilized facilities, or over obsolete facilities that are used only during peak periods, the greater is the divergency between costs caused and costs assigned.

SPCC argues that the premium should be phased out only with equal access.

SPCC perceives an underlying premise in AT&T's comments—everything about access should be the same even if the access itself is different. In fact, access rates must reflect the current differences in how access is provided. The Commission's rules must be constructed and applied so as to prevent any carrier from being improperly advantaged or disadvantaged because of current facility differences.

SPCC states that only AT&T, for apparent self-serving reasons, contests the assertion that the premium must be raised.

SPCC believes that the issue of premium size should be afforded the highest priority. An appropriate premium is at the heart of this docket.

The end user usage charge is inconsistent with the way OCC service is provided. The exchange carrier has no means of knowing whether the call is completed. There is no way to match the records of the local operating companies with the OCC's records.

SPCC believes that an OCC surrogate should be rejected since it would disadvantage AT&T's competitors. SPCC reiterates its view that end user usage charges not be applied to OCCs.

Deregulation of billing is inconsistent with forcing OCCs to use billing services. SPCC recommends that revenues associated with the usage charge be allocated to AT&T as an addition to premium.

SPCC notes that the definition of conversation minutes is critical but that AT&T's proposed definition is untenable. AT&T's definition could add 15 to 50 seconds to a call. It does not define conversation but holding time minutes. This is inconsistent with the Separations Manual definition. SPCC urges the Commission to reject AT&T's definition and adopt one similar to the Division of Revenue definition or use billed minutes.

SPCC argues that OCCs are subject to the same discrimination claimed by WATS resellers. Advantages from being able to provide WATS service would more than offset the premium. SPCC would pay more than AT&T even if it merely resold the AT&T service. SPCC believes that the arbitrary distinction between "common" and "dedicated" customer lines assigns a reverse premium to OCCs. SPCC urges the Commission to reject AT&T's redefinition of "dedicated" access lines and include closed end WATS minutes in the calculation of the carrier's carrier charge.

SPCC congratulates the Commission on instituting an interconnection phase of Docket 78-72. SPCC believes that pricing cannot be considered separately from the technical and operational characteristics of access.

SPCC shares the AT&T concern that the rules quickly be finalized. SPCC believes that all issues must be examined but that the premium charge computation is essential under any circumstance.

SPCC believes that the Commission should not acquiesce to the 1991 termination of the equal charge requirement.

SPCC agrees with AT&T that the rules do not recognize the difference in features currently provided. SPCC suggests that differences in separations weighting factors would be appropriate. SPCC disagrees with AT&T's solution. It believes that transport termination is part of transport, not an end office function.

SPCC presents tables that, it states, classify exchange access and office and transport features correctly.

SPCC notes that the transport charge rules appear inconsistent with the consent decree. SPCC asserts that the waiver petition is insufficient SPCC requests that new rules, which reflect technical inferiority, be adopted. SPCC believes that the MFJ requirement reflects good public policy and should be reflected in the rules.

SPCC states that disaggregation is consistent with equal charges.

SPCC notes that the Order does not result in cost-based pricing because business users and OCCs pay different prices for access. The access charge plan also hampers efficient service since it has no off-peak discount.

SPCC believes that petitions to assign pay telephone costs to carriers or end users should be rejected since they fail to recover costs from the cost causer, since OCCs cannot identify pay telephone calls and since SPCC would have to cover costs of pay telephone equipment in areas it does not serve. SPCC also urges that any usage based pay telephone charge reflect the different access quality.

SPCC opposes the grant of AT&T's blanket request for waiver of rules prohibiting non-usage based transport charges. Special construction charges would fall most heavily on OCCs since the AT&T access network is already in place.

SPCC objects to AT&T's request to alter the allocation of automatic message recording equipment since OCCs do not benefit from this service. SPCC also objects to attempts to assign Business Relations Expenses by the number of customers.

SPCC also objects to AT&T's proposed vague rule concerning connecting company relation expense. SPCC does not believe it should be burdened with interstate sales and advertising expense from which it receives no benefit.

SPCC objects to the Ad Hoc petition to eliminate the end user usage charges. This is not in accord with cost causation. It might also disturb the transition to flat charges.

SPCC believes that federal implementation is necessary and so opposes the Illinois petition.

Tele-Communications Association (TCA)

TCA petitions the Commission to indicate that exchange carriers should use appropriate Centrex trunk equivalency ratios in computing end user flat charges to be applied to Centrex lines.

TCA states that state regulators treat Centrex intercom and Centrex exchange access differently and require a separate rate for the two functions. Centrex-CO usually generates a contribution to basic exchange services. Inasmuch as the Centrex intercom function does not access exchange or toll services, and inasmuch as this function is the reason for so many lines, an access charge should only apply to the access portion.

TCA argues that UTCC's statements and arguments about Centrex are inaccurate. TCA also opposes NATA and TAM concerning Centrex.

TCA states that Centrex software can generate "virtual trunk" arrangements limiting the amount of network access. Therefore, levying a full access charge is inappropriate.

TCA states that imposition of unadjusted charges will result in abandonment of Centrex. Stranded investment will not be immediately reused.

The migration from Centrex-CO will strand hundreds of millions of dollars of CO and outside plant investment. Burdening customers of the local exchange carrier's other services.

TCA states that trunk equivalency ratios are used for both interstate and intrastate cost allocations. Bell division of revenue uses a PBX equivalency ratio for recovery of Centrex revenue requirements.

Centrex CO service imposes lesser access requirements on the network than do PBX trunks or business lines.

To demonstrate that Centrex would be subsidized, it would be necessary to show that total Centrex revenues do not cover costs, but this has not been shown.

The revenue requirement resulting from PBX ratios will match current revenue requirements.

TCA states that, whether Centrex involves one or several premises, it involves one switch. The number of lines at this switch should be used to calculate the PBX equivalency.

TCA supports AT&T's proposal to allow interexchange carriers to purchase dedicated access. TCA urges the Commission to require separate line charges for such resold access lines.

TCA agrees that the Commission should specify that ICAM principles and procedures control allocation and measurement of costs for special access except where specific rules supersede the ICAM. All that this would require would be clarification, not a rules change.

TCA agrees that interexchange carriers should be allowed to obtain dedicated access lines as agents for customers. End users should also be allowed to order dedicated access lines. TCA urges a requirement for separate billing of such dedicated lines provided as agent.

TCA states that unbundling is especially important if the AT&T recommendation on expensing special access is accepted.

Telecommunications Association of Minnesota (TAM)

TAM generally supports the UTCC petition for clarification asking that Centrex users be charged for access on a flat rate.

TAM states that even if the Commission wishes to implement an "equivalent trunk" charge, the ratios proposed by AT&T and the BOCs are not representative of what other customers in like situations would pay for access and unfairly discriminate in favor of large Centrex users because they fail to account for the frequent use of multiple separate premises. TAM suggests that the Commission must include an "equivalent premise" factor if it wishes to use an equivalent trunk charge. As it stands, AT&T's proposal discriminates across Centrex premises.

GTE Telenet

Telenet requests that the Commission set aside action imposing carrier, as opposed to end user, access charges upon enhanced service providers. Until now, Telenet had no notice that its interests might be affected.

Even now, it is far from clear that carrier charges are to be levied upon enhanced service providers. Such charges are unlawful since there was no notice, the record does not support such a charge, and the Order fails to justify such a charge. A further notice would be required. Questions addressed in such a notice would include whether such charges would unreasonably discriminate against enhanced service providers, what would be the economic impact of such charges, and whether such charges could be implemented by local carriers.

Telenet states that the MCI complaint should not be incorporated as a comment without some order or notice, nor does the MCI complaint support such a charge.

Only MCI claims that notice was given. No party has challenged Telenet's contention that the record is inadequate. No one has challenged Telenet's contention that a further proceeding would be required to impose carrier charges on enhanced providers.

Telenet states that the evidence offered by MCI does not support MCI in claiming that notice was given. MCI does not argue that its complaint constitutes notice.

Telenet states that applying carrier charges to enhanced providers would discriminate against them compared to private users. Telenet finds no support for MCI's contention that private systems would pay. Other carriers ignore this discrimination.

Telenet believes that enhanced and basic markets are distinct.

Telenet submits that AT&T's belief that enhanced providers can be identified is no substitute for facts. AT&T has sought reconsideration of dedicated access because it can not tell who is what, but this is inconsistent with the ability to determine who is an enhanced provider.

Telenet notes that the determination of what constitutes an enhanced service provider will have to be made by telephone companies. This may lead to additional discrimination.

Telenet states that the Order is silent on why private networks should be treated differently than enhanced service providers.

Telenet points out that imposition of carrier access charges on itself would drive its large users to private systems and force its small users off the network.

Telenet doubts that the Commission understood or intended the uneconomic effect resulting from imposing carrier charges on enhanced providers.

Tymnet

Tymnet views singling out enhanced providers as fatally flawed. Tymnet wishes to pay what others in similar situations pay. Tymnet submits that the Commission's treatment of enhanced service providers is discriminatory under Section 202(a) of the Communications Act and will have a devastating effect on service to the public. Others who use the network in a fashion functionally equivalent to "enhanced service providers" will not have carrier's carrier charges imposed. This is unlawfully discriminatory.

Tymnet argues that MTS and value added services have low cross elasticities and are not functionally equivalent. Value added carriers use the public network only at one end. Using the Commission's logic, carriers carrier access charges would have to be expanded to any private line user capable of accessing the public switched network. No carrier's carrier access charge can be applied to enhanced service providers on the basis of the record which exists in this proceeding. No notice was given. There is no explanation.

Tymnet cannot determine which carrier's carrier charges it will be subjected to.

The transitional carrier's carrier charges which Tymnet apparently will be forced to pay may well lead to uneconomic bypass of value added public data communications networks by large users, increased rates to smaller users and elimination of service to many who rely on Tymnet.

Tymnet states that no one attempts to refute its showing that elimination of carrier charges on enhanced providers would increase carrier charges by only $.0015 per minute. Opponents do not address the uneconomic cost increases.

Tymnet notes the support for its position from numerous parties. Even opponents recognize the need to eliminate possible double charges.

Tyment states that exchange carriers perceive difficulties in distinguishing between end users.

Tymnet agrees that it had notice that it would be subject to end user charges but not carrier charges.

Uninet

Uninet supports petitions filed by Telenet, ADAPSO, Ad Hoc, and CompuServe to the extent that the petitioners advocate that enhanced service providers be classified as end users for purposes of access charge rules.

Uninet has not heretofore participated since it did not know that its interests could be affected. Uninet believes that the Commission should modify its rules to permit the unencumbered development of the enhanced services market. An insufficient record exists to extend access charges to enhanced services. If a record existed, it would demonstrate anti-competitive effects of access charges.

United Telecommunications, Inc.

United finds the definition of dedicated access line troublesome as it requires identification of customer CPE. United recommends treating all private lines as special access.

United recommends an exception to § 69.3(e)(3) of the Rules to allow carriers to file their own billing and collection tariffs since these are not subject to rate of return constraints.

United believes that § 69.3(e)(3) and (9)(EAS) will force all carriers to concur in the EAS tariff for TS elements. The Commission should realize that other joint provisions of access arrangements will also exist. All that is required is agreement and procedures for identification of interstate traffic and compensation. Compensation could be effected through aggregated tariff charges. United believes that a general rule requiring joint arrangements in cases where joint provision is available is appropriate.

United notes that many calls made from pay phones are not sent paid. United recommends cost recovery like that used for intercept. United does not agree with Rochester's proposal to cover pay phone costs through a local surcharge.

United also believes that MCI's proposal to recover pay telephone interstate revenue requirements from local exchange subscribers should be rejected, but finds AT&T's proposal that the charge be assessed on originating rather than total usage acceptable.

United finds proposals by USTS and Western Union involving exchange carrier pay station charges deficient since not all such calls can be identified and billed. Further, this requirement would be costly and burdensome.

United opposes SBS and SPCC proposals to recover costs only from interexchange carriers that can be accessed from those pay phones and to do so on the basis of actual

(sampled) pay phone usage. Claims that overall usage measures would overstate OCC pay telephone usage are unsupported. Sampling would be unduly burdensome and costly.

United opposes unqualified inclusion of semipublic phones in the pay category. An identifiable end user exists, and a flat charge should be charged. United would concur if only equipment but not the local loop were included.

United believes that the third party billing requirement is burdensome. Third party billing should fall into the transitional surcharge category. The rules do not specify treatment of credit card calls. United suggests that these also be subject to the transitional surcharge. United believes that a general OCC surrogate waiver is needed. OCC arguments that such a surrogate would reduce their competitiveness should not be considered.

United supports the AT&T definition of conversation minutes. OCC proposals related to billing minutes do not reflect exchange carrier costs. Also local carriers have no means of verifying billable minutes. This issue should quickly and unambiguously be decided.

United believes that pleas for extending ENFIA should be rejected. United is not a party to ENFIA. Moreover, ENFIA has been found to be unlawful.

United believes that the proposal to advance the filing date is impossible, and the proposal to delay the effective date is premature.

United believes that USTS's proposal to shift the USF to end users is inappropriate. The present plan is neither unreasonable nor unduly burdensome.

United concurs with several AT&T/GTE proposals concerning traffic expenses. Network Administration (Accounts 621 and 624) should be apportioned on the basis of apportionment of COE Category 1–7. Centralized Ticket Investigation (Account 624) should be directly assigned to billing and collection. Traffic engineering (Account 621) should be apportioned on combined COE plus interexchange OSP investment. All other traffic expenses should be apportioned among interexchange category and Intercept, Information and Operator Assistance elements based on Standard Work Time Seconds.

United believes Rochester's proposal to allocate all COE Category 4 to LS 2 local switching is deficient because this equipment will be used for billing other carriers. Also COE Cat 4 includes Account 651 metering equipment.

United recommends apportionment of Automatic-Message Recording Equipment among end user, carrier, and billing and collection elements.

United notes that Category 1C space investment includes space used by Category 8 COE, and argues that the 1C space investment should be more fully allocated. United also recommends apportioning Category 2 space equipment in the same proportion as Operator Wages.

United suggests that COE-CAT 1 manual switching be allocated based on weighted standard work time seconds.

United notes that local commercial expenses (Account 645) include pay station collections that should be directly assigned, and that remaining local commercial expenses be associated with billing, and work functions associated with end user and interexchange carrier access billing.

United believes that since Category 4 COE and Commercial expenses are projected for the interexchange category, it is appropriate that some Revenue Accounting Expenses also be assigned there.

United Technologies Communications Company (UTCC)

UTCC requests that the Commission clarify the procedures under which it will count Centrex lines. UTCC recommends that each Centrex subscriber line be assessed an end user charge. Any alternative would be unreasonably discriminatory and contrary to technical or economic justification.

Although line-counting is straightforward in most uses, it is unclear how the Commission intends to count Centrex lines. Technically a Centrex line is virtually identical to a standard common line loop. Centrex lines are fundamentally different from PBX lines and impose substantially greater network costs. In many cases, PBXs use 15 percent of the lines used by a comparable Centrex. Centrex offers station-by-station identification of toll calls, something not done by the central office for PBXs. From a user perspective, the only difference between a business line and a Centrex line is the need to dial 9.

UTCC states that the Commission must establish uniform rules for counting the various types of lines. The Commission should not prop up an inefficient service due to fears of adverse effects.

USITA

USITA believes that the purpose of the EAS requirement can be served by modifying the rules to permit development of a common tariff as the sum of the individual rate elements that each company would use were it to file its own tariff. USITA notes that there is little opposition to its proposal to eliminate the EAS requirement.

The requirement that the ECA tariff be targeted at 12.75 percent conflicts with the uncapped return on billing. USITA suggests that billing and collection be disassociated from other traffic sensitive rate elements and established as a separate rate element under a separate voluntary pool.

USITA notes no opposition to its plea to allow average schedule companies to choose between individual company cost studies and average schedules.

USITA urges the Commission to modify rules to require the total recovery of interstate revenue requirements associated with interstate use of pay stations from all interexchange carriers, on a relative minutes of use basis.

USITA urges that OCC minutes of use not be deflated. How OCCs use access is under the OCCs' control, and exchange carriers should not be responsible for it.

USITA is concerned about the need for a traffic sensitive USF. While USITA believes that a Joint Board might be needed, USITA suggests that the Commission make clear on reconsideration that this issue will be thoroughly explored and resolved in the Joint Board case.

USITA believes that semipublic phones should be classified separately from coin phones. An access charge on semipublic phone customers appears appropriate and workable. Coin phones are different. For coin phones, access charges must be imposed on interexchange carriers.

The rules appear to treat various collect-type calls differently. The Commission should treat third party and credit card calls in a manner consistent with other sent collect-type calls and recover interstate costs associated with such calls on a usage basis.

It would be burdensome to divide up party line flat fees on a line-by-line basis. A study area or larger basis should be used to calculate average customer/line for each grade of service.

Dedicated access lines should be billed to whoever orders them.

USITA suggests that the ECA bill only the premium, not the carrier's carrier charges.

USITA suggests to the extent that Appendix G reflects the views of the Commission rather than the thoughts of its anonymous authors, that this issue be reconsidered in depth.

USITA is concerned that if State tariffs follow interstate tariffs in the TS side, revenues may not match costs, yet states may have no alternative.

U.S. Telephone (U.S. Tel.)

U.S. Tel notes that the ACP hinders realization of the Commission's goals. The ACP closes the present legitimate price differential between AT&T and others.

U.S. Tel states that the ACP sacrifices fair competition to insure below cost local pricing. Any subsidy should be paid by AT&T. As it stands, the ACP is an undue and inequitable hardship on the smallest carriers.

U.S. Tel recommends maintaining the existing price differential until competition develops.

U.S. Tel believes that the shortage of superior access arrangements increases the opportunity cost of premium access. Equal access will only start to be offered by the end of 1984, and independents will move even slower.

U.S. Tel argues that the ACP provides for unjustified cross-subsidy. A per line charge for the UST would be more appropriate.

U.S. Tel states that since the AT&T Class 4 office is strategically placed to minimize distance, distance-sensitive rates discriminate in favor of AT&T. The Commission's five mile rule does not remedy the basic flaw. The MFJ solution at least seriously addresses the untoward advantage enjoyed by AT&T.

U.S. Tel notes that the transport distinctions find no support in the record.

Since AT&T is the reason for billing services, developmental costs should be charged to AT&T.

U.S. Tel urges the Commission to prohibit the ENFIA surrogate.

Placing AT&T as administrator of the ECA is inappropriate.

United States Transmission Systems (USTS)

USTS believes that the premium is illusory. USTS proposes $2.8 billion, in place until equal interconnection is achieved and phased out on the basis of access lines accorded equal interconnection.

USTS argues that nationwide averaging is inefficient, USTS calls for a timetable for deaveraging below the study area level. USTS opposes optional deaveraging.

Since eligibility for a USF is to be based on total NTS costs, USTS submits that there is no rationale for singling out interexchange carriers. A usage recovery of the USF will lead to bypass. Only a small per line surcharge would be required.

USTS states that the premium should reflect OCC costs incurred because of unequal interconnection. After the transition, if unequal access remains, the premium charge could be earmarked to cover the costs of conversion.

USTS states that AT&T ignored its analysis of the premium and that its own analysis reflects only OCC costs for compensating for unequal access based on empirical analysis.

USTS states that the premium should be reduced in proportion to the availability of equal access. The adoption of an access charge does not signal full competition; this would require equal access.

USTS states that AT&T's position that the premium should be eliminated is not credible. Cost-based rates are not optimal until OCCs have a full choice over access. USTS denies that its premium proposal reflects value of service.

USTS states that ENFIA B and C are new types of inferior access and have interconnection shortcomings that render them unattractive. USTS states that rates for these services have never been cost justified. Given equal access shortly, OCCs would be foolish to reconfigure their systems twice.

Whenever the exchange carrier cannot identify the customer (e.g., ENFIA, collect calls, etc.) the interexchange carrier should be required to provide the necessary information (for a fee) to allow the exchange carriers to do the billing.

USTS states that OCCs do not object to surrogate charges in order to gain a competitive advantage but to prevent an anticompetitive handicap. USTS would not be able to properly assess such charges on end charges. The Commission need not revise its judgment that exchange of information is the appropriate solution. If this is not practical, USTS calls for elimination of the end user usage charge.

USTS supports SBS's proposal to recover pay telephone costs based on a sample of actual usage. USTS supports exclusion of semipublic phones and end user charges on these phones.

USTS argues that billed minutes are appropriate. AT&T and United define conversation minutes akin to holding time minutes. The result is unlawful discrimination. USTS believes that the ENFIA process has clarified the billed minute concept. Either the current ENFIA or some other specially designed approach could be used.

USTS notes that meetings on interconnect standards are required by Docket 20099, are necessary, not inconsistent with the Order, and are not being held. It requests that the Commission clarify its order to require such meetings.

In view of the monopoly power held by exchange carriers; more detailed accounting rules are required.

USTS advances four principles that must be used: costs must be paid by the entity incurring the costs; costs must be allocated in the manner in which they are incurred; rates must be based on costs; and costs must be disaggregated. The Order does not apply these principles in a consistent manner.

For example, billing and collection should be cost-based and justified and TS costs should be paid by the end user.

USTS submits that excluding resellers would be unwarranted. USTS agrees with AT&T that double charging can be eliminated.

USTS believes that a longer tariff review period is necessary. A six-month notice and a 90-day review period are minimum periods.

USTS fears that if the Order is implemented as written OCCs will pay more for access than AT&T in 1984 and receive less.

Vermont Public Service Board

Vermont agrees with petitions claiming that the Commission has not given adequate attention to universal service. Vermont believes that carriers should pay more, that access

charges should be averaged, and that there should be a mandatory pool for traffic sensitive costs.

Vermont believes that the access charge would cause significant numbers of Vermont customers to cancel service. It and Docket 80–286 would result in increases of 116 percent over the next five years in addition to a 47 percent increase in intrastate revenue requirements.

Vermont notes that Judge Greene also suggests that the Order will jeopardize universal service.

Vermont states that bypass has not been shown to be a real possibility.

Vermont believes that NTS costs are joint costs and cannot be allocated on an entirely economic basis. They should be allocated to meet goals.

Vermont believes that the FCC has gone too far to avoid bypass at the expense of universal service. The FCC should not rely on Congress for aid in preserving universal service.

In the alternative, Vermont supports the Illinois Petition to allow States to implement access charges.

Vermont believes that if access charges are deaveraged, MTS deaveraging is not far behind.

Washington Utilities and Transportation Commission (WUTC)

WUTC files in support of the AT&T Centrex petition.

The $4 per month would result in a 44 percent increase in Centrex bills in Washington and only a 6 percent rise for PBXs. The results would be a massive shift from Centrex resulting in stranded investment and resulting from uneconomic rates.

WUTC estimates that $58.4 million investment would be stranded if 95 percent of Centrex subscribers shift to PBXs.

WUTC believes that the application of the access charge is uneconomic because Centrex users are already priced to meet competition. Centrex lines are more similar to lines connecting phones to PBXs.

WUTC states that additional costs would arise in non-Bell areas of Washington.

WUTC suggests that the answer is to keep Centrex competitive with PBX services.

Western Union

Western Union believes that the Commission cannot and should not abrogate the settlement agreement in Docket 20099 which requires six months notice before certain rates charged OCCs can be changed.

WU believes that notice that access charges were being considered does not constitute notice that an agreement was to be abrogated.

WU does not deny that the Commission can abrogate agreements, just that it did it validly. No party and no notice brought up abrogation as an issue.

The Commission's findings are inadequate under Sierra Mobile. The Commission did not and cannot find unequivocal public necessity as required by Permian Basin Area Rate Case. The Commission has not investigated the contract, just tariffs.

WU claims that AT&T has told Congress that it could file new tariffs by June 1 (on March 22, 1983). WU cannot understand why 90 days are needed after reconsideration when only 90 days were required in the first place. At any rate, AT&T now has information needed for special access rules.

WU states that routine handling would result in Commission abdication of responsibility. WU states that the Commission has the authority to require longer filing periods when tariffs are filed in response to a Commission order. It would be better to delay AT&T's self-imposed deadline than to allow the most important tariffs ever filed with the Commission to go into effect without adequate review.

WU states that reconsideration of the premium cannot be deferred. If further proceedings are needed, existing ENFIA rates could be preserved. WU believes AT&T'S arguments for no premium are without merit. Customers who desire dialing convenience should be willing to pay.

The premium is too low, and should be recovered on a per minute basis. Value of premium access depends on minutes. The current ENFIA differential must be considered a starting point. Access received by OCCs is still the same as it was four years ago for most ENFIA lines. Furthermore, there is no basis for the premium selected.

Western Union argues that the premium in any year should depend on interconnection quality differences in that year, rather than on a present schedule.

WU finds its views supported by MCI and others.

WU believes that the AT&T petition would exacerbate the anticompetitive impact of the existing access disparity. In particular, AT&T's definition of conversation minutes should be rejected. OCCs suffer higher holding time because of inferior access.

OCCs do not get answer supervision. For this reason, WU states, it is virtually impossible for exchange carriers to measure their minutes of use.

WU states that OCCs cannot identify end users because of lack of ANI. The surcharge on OCCs would result in a higher uncapped charge for large users, reducing OCC competitiveness.

WU states that AT&T's pay phone proposal would force OCCs to pay for equipment in areas they do not serve. Also they would be charged for services they do not provide like collect MTS and IN-WATS. Finally, OCCs cannot identify pay telephone users and would have to spread costs over all users to the OCC's disadvantage. WU suggests a clearing mechanism to collect revenues from billing carriers.

WU questions whether the Commission complied with the notice-and-comment requirement of the Administrative Procedures Act in determining the premium.

WU believes that non-recurring charges and disaggregation should not be used to frustrate competition.

WU believes that WATS should pay its full share of the USF.

The Commission must allow itself and the affected parties the time to analyze any tariffs.

The access charge plan harms competition by increasing the per minute NTS charge on OCCs and reducing the charge assessed AT&T with no change in access quality received.

WU believes that special access tariffs are separable. Delay of the effectiveness of special access tariffs would not require MFJ adjustments. Moreover, AT&T could file special access tariffs now in order to meet deadlines as these rules are not challenged in Reconsideration.

WU argues that AT&T's Centrex proposal is frivolous, and inconsistent with cost-based rates. Access charges are levied on lines, not stations. AT&T's proposal, not the Rules, would create unjust discrimination. No one has shown a cost basis for different treatment of Centrex. WU states that the AT&T proposal constitutes an attempt to cross-subsidize Centrex. WU states that no one has provided any elasticity study to justify their extreme assumptions.

WU concurs with those seeking to treat enhanced service providers like end users. There is no record to treat these vendors as carriers. WU sees problems of discrimination and difficulties of enforcement.

WU states that it provides Telex and private line services over voice grade special access lines. These services do not utilize the CPE or "all other station equipment" that AT&T proposes to recover from all "comparable voice grade lines." AT&T's special access proposal would, therefore, burden WU's customers and depart from cost-based rate.

To solve the identification problem, WU suggests that the interexchange carriers that order access facilities be permitted to certify the use of the ordered facilities to the exchange carrier to ensure that telex, video, and other private lines are not burdened with unrelated costs.

On reconsideration it is essential that the Commission specify the elements and subelements for computing charges for special access facilities and services.

Table 1
Projected 1984 OCC NTS Discount VS.
Effective OCC Cost-Per-Minute Discount

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
OCC NTS Discount[a] (%)	Premium Amount ($ B)	NTS Residual[b] ($ B)	Est. 1984 OCC Share of NTS Residual[c] ($ B)	Est. 1984 NTS Residual Per Min.[d] ($)	Est. 1984 AT&T Premium Per Min.[e] ($)	Total Est. 1984 AT&T NTS Cost Per Min.[f] ($)	Est. 1984 OCC Line-Side Transport & Switching Per Minute[g] ($)	Est. 1984 AT&T Trunk-Side Transport & Switching Per Min.[g] ($)	Total Est. 1984 OCC NTS & TS Cost Per Min.[h] ($)	Total Est. 1984 AT&T NTS & TS Cost Per Min.[i] ($)	Est. 1984 OCC-AT&T Total Cost Per Min. Differential[j] ($)	Est. 1984 Percentage OCC Dis From AT&T Total Per Min.[k] ($)
100	6.20	0	0	0	0.0523	0.0523	0.030	0.032	0.030	0.084	0.054	64.3
95	5.89	0.31	0.0217	0.0024	0.0497	0.0521	0.030	0.032	0.032	0.084	0.052	61.9
90	5.58	0.62	0.0434	0.0049	0.0471	0.0520	0.030	0.032	0.035	0.084	0.049	58.3
85	5.27	0.93	0.0651	0.0073	0.0445	0.0518	0.030	0.032	0.037	0.084	0.047	50.0
80	4.96	1.24	0.0868	0.0097	0.0419	0.0516	0.030	0.032	0.040	0.084	0.044	52.4
75	4.65	1.55	0.1085	0.0123	0.0392	0.0515	0.030	0.032	0.042	0.084	0.042	50.0
70	4.34	1.86	0.1302	0.0146	0.0366	0.0512	0.030	0.032	0.045	0.084	0.039	46.4
65	4.03	2.17	0.1519	0.0170	0.0340	0.0510	0.030	0.032	0.047	0.083	0.036	43.4
60	3.72	2.48	0.1736	0.0195	0.0314	0.0509	0.030	0.032	0.050	0.083	0.033	39.8
55	3.41	2.79	0.1953	0.0219	0.0288	0.0507	0.030	0.032	0.052	0.083	0.031	37.4
50	3.10	3.10	0.2170	0.0243	0.0262	0.0505	0.030	0.032	0.054	0.083	0.029	34.9
45	2.79	3.41	0.2387	0.0268	0.0236	0.0504	0.030	0.032	0.057	0.082	0.025	30.5
40	2.48	3.72	0.2604	0.0292	0.0209	0.0501	0.030	0.032	0.059	0.082	0.023	28.1
35	2.17	4.03	0.2821	0.0316	0.0183	0.0499	0.030	0.032	0.062	0.082	0.020	24.4
30	1.86	4.34	0.3038	0.0341	0.0157	0.0498	0.030	0.032	0.064	0.082	0.018	22.0
25	1.55	4.65	0.3255	0.0365	0.0131	0.0496	0.030	0.032	0.067	0.082	0.015	18.3
20	1.24	4.96	0.3472	0.0389	0.0105	0.0494	0.030	0.032	0.069	0.081	0.012	14.8
15	0.93	5.27	0.3689	0.0414	0.0079	0.0493	0.030	0.032	0.071	0.081	0.010	12.4
10	0.62	5.58	0.3906	0.0438	0.0052	0.0490	0.030	0.032	0.074	0.081	0.007	8.6
5	0.31	5.89	0.4123	0.0462	0.0026	0.0488	0.030	0.032	0.076	0.081	0.005	6.2
0	0	6.20	0.4340	0.0487	0	0.0487	0.030	0.032	0.079	0.081	0.002	NA

NOTES:

a. OCC NTS discount equals ratio of Premium Amount of Column (2) divided by the total NTS revenue requirement of $6.2 B for 1984. ($6.2 B excludes estimated NTS contributions by private line service ($1 B) and end-user flat charges ($3.5 B) for 1984.)

b: $6.2 B minus column (2). Column (2) plus Column (3) equals $6.2 B.

c: A forecast 7% MTS/WATS-equivalent market share for the OCCs in 1984 is assumed. Column (4) equals 0.07 times column (3).

d: A forecast estimate of 127.4 B minutes of use of local exchange plant for terminating and originating interstate interexchange traffic in 1984 is assumed. This estimate is a proxy for 1984 interstate "access minutes."

e: A forecast 93° MTS/WATS market share for AT&T in 1984 is assumed. AT&T premium per minute is based on 118.48 B minutes, i.e., 127.4 B x 0.93.

f: Column (5) plus column (6).

g: Per AT&T letter dated 7/18/83 and filed in CC Docket 78-72.

h: Column (5) plus column (8).

i: Column (7) plus column (9).

j: Column (11) minus column (10).

k: Column (12) divided by column (11) multiplied by 100.

SEPARATE STATEMENT OF
FCC Commissioner James H. Quello

In re: The Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I

By its action today the Commission has taken another very important step towards truly competitive telecommunications. As we move further toward cost-based pricing, we'll begin to see more and more of the positive elements of true competition in the form of innovation and efficiency that are vital to competitive markets. As real competition takes hold at an accelerating rate, the American people only stand to benefit. I have no illusions that our decision will be greeted with widespread applause because it includes elements of discomfort for virtually everyone. However, in leaving the relative comfort of the telecommunications monopoly and venturing into the competitive arena, some disruption is inevitable and we can only attempt to minimize that disruption. I believe that our decision will have that effect.

We are hearing anguished cries that universal service is threatened as a result of actions taken by this Commission and by the courts. Certainly, as we all embrace the concept of fully competitive telecommunications services, universal service is threatened. But I am convinced that the threat will be curbed by establishment of the Universal Service Fund and by continued Commission surveillance of the effects of our actions. I am fully committed to maintaining universal service and I know that this Commission shares that commitment. The Commission has sufficient flexibility to ensure that basic telephone service will continue to be available at affordable rates.

CONCURRING STATEMENT OF COMMISSIONER
MIMI WEYFORTH DAWSON

Re: MTS AND WATS MARKET STRUCTURE, CC DOCKET NO. 78-72, PHASE I

The Commission's reconsideration of its December, 1982, access charge decision establishes another landmark in the history of telecommunications policy. In this *Reconsideration Order*, the Commission has affirmed its support of the concept of end-user access charges, the cornerstone of its access charge decision last December. By remaining steadfast in its commitment to the end-user access charge concept, the Commission has assured ratepayers that the benefits of an increasingly competitive telecommunications industry will not be denied the American public. The Commission decided in December and has affirmed on reconsideration that the cost recovery rules of an earlier era in telecommunications should

be modified to accommodate the evolving structure of the contemporary telecommunications industry.

While revolutionary from an historical perspective, end-user access charges are a logical and inevitable result of increasing competition in the telecommunications industry. By allowing entry in the markets for terminal equipment, private line services, and eventually switched network services, the Commission has allowed multiple industry suppliers to offer consumers a broader array of products and services at differing prices and grades of service.[1] A casualty of the Commission's open entry policies, however, is telecommunications pricing that is designed to subsidize one group of users by pricing some telecommunications services above cost.[2] The potential loss of subsidies embedded in telephone rates is not, however, a cause for alarm. In general, setting public utility rates above cost for some services so that the rates for other services are subsidized is a wasteful, inefficient way to pursue an income redistribution goal.[3, 4] Cost-based pricing of public utility services discourages the wasteful use of resources allocated to the production of telecommunications services and generally improves aggregate consumer welfare

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[1] The Commission has examined the benefits of its open entry policies in various dockets over the years. See, for example, *Economic Implications Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, Second Report, 75 FCC 2d 506 (1980).

[2] Various types of telecommunications subsidies have been discussed and debated over the years. One mode of classification distinguishes "service cross-subsidies" from "jurisdictional cross-subsidies." Service cross-subsidies refer to revenues from one service recovering a portion of the allocated cost of another service. Jurisdictional cross-subsidies refer to the intrastate investment and expenses incurred by local telephone companies that is allocated in part to the interstate jurisdiction for recovery in interstate toll rates. The "existence" of subsidies depends in substantial part on how such subsidies are defined. For an overview of some of the conceptual difficulties involved, see E. Zajac, *Fairness or Efficiency: An Introduction to Public Utility Pricing* Chapter 8 (1978). Regardless of definition, cross-subsidies embedded in public utility rates are vulnerable if closed-entry markets are opened and the pricing practices of the new entrants are largely unregulated.

[3] Strictly speaking, optimum pricing by a multioutput public utility firm subject to a revenue requirements constraint may require that output prices optimally depart from marginal cost. Such "Ramsey pricing" that is consistent with constrained, static welfare maximization should be contrasted with public utility rates that do *not* optimally depart from marginal cost and are *less* than marginal cost. For a survey of the Ramsey pricing literature, see Brock, *Pricing, Predation, and Entry Barriers in Regulated Industries* in *D. Evans*, ed., *Breaking Up Bell: Essays on Industrial Organization and Regulation*, Chapter 8 (1983).

[4] For further discussion of the inefficiencies of untargeted subsidies, see Bridger M. Mitchell, "Pricing Subscriber Access to the Telephone Network," *The Rand Paper Series* #P-6815, October, 1982.

compared to pricing that is not closely aligned to cost.[5]

In brief, the end-user access charge is consistent with the principle of cost-based rates or "cost-causation," the Commission's general benchmark for just and reasonable rates.[6] The non-traffic sensitive (NTS) costs of local exchange plant allocated to the interstate jurisdiction and recovered in interstate long distance telephone rates are, in reality, just a portion of the costs of *local* telephone service. Therefore, it is both efficient and fair that these NTS costs, i.e., the local loop and other attendant facility costs of providing *dedicated* access for individual users to the local switch, should be borne by ratepayers who cause such investment in dedicated facilities to be made by telephone companies. The principle of cost causation is, therefore, entirely consistent with the Commission's policies fostering open entry and competition in the telecommunications industry. Such policies, together with the impending divestiture of the Bell operating companies from AT&T, have rendered obsolete the concept of a single, integrated nationwide monopoly in local and long distance telephone service. The Commission's procompetitive policies and the AT&T divestiture have created separate but interconnected markets in local and long distance telephone service. The Commission's access charge plan recognizes this structural change in the telecommunications industry and provides a transition toward the eventual full recovery of local telephone costs in local rates plus end-user access charges. Following the transition, interstate long distance telephone rates should more closely approximate the costs of long distance transmission, except for carrier contributions to the "Universal Service Fund" paid as carrier's-carrier charges and ultimately reflected in interstate long distance rates.

In this *Reconsideration Order*, the Commission has refined the end-user access charge concept in several significant ways. First, the transitional, usage-sensitive end-user access charge (or "mover") has been eliminated. Although a usage-sensitive end-user access charge may have provided exchange carriers with some flexibility in recovering interstate NTS costs, I expressed some concern in my Separate Statement to the Commission's *Third Report and Order* last December (*"Access Order"*) that this flexibility may be a "double-edged sword" that would introduce ratemaking complexities that exceeded their benefits to either consumers

[5] A study by the National Telecommunications and Information Administration has estimated that if local telephone rates fully recovered all local exchange non-traffic sensitive (NTS) costs and MTS rates were allowed to fall following removal of interstate local exchange NTS costs presently recovered in MTS rates, consumers would be better off economically by approximately $1.6 billion annually. See Comments of the National Telecommunications and Information Administration to the Federal-State Joint Board, CC Docket 80-286, Appendix D.

[6] *Private Line Services (TELPAK)*, 61 FCC 2d 587 (1976).

or carriers.[7] Therefore, I strongly support the Commission's decision on reconsideration to eliminate this aspect of the end-user access charge rate structure. By eliminating the end-user usage charges, the Commission has substantially simplified the estimation of revenues to be derived from end-user flat charges, has made the concept of end-user access charges easier to understand by ratepayers and easier to administer by exchange carriers, and has eliminated the need for complex surrogate charges for telephone subscribers who select other common carriers (OCCs) for their long distance telephone service.

Second, the Commission has emphasized on reconsideration that it will entertain petitions for "lifeline" waivers of the end-user access charge for residential subscribers. This waiver of the interstate end-user access charge should help alleviate the fear that the imposition of such charges will threaten the availability of telephone service to the minority of subscribers who may be unable to absorb this increase in the cost of telephone service. The Commission, on reconsideration of the *Access Order*, has established a mechanism through its lifeline waiver option that offsets any threat to the wide availability of telephone service. Residential ratepayers who simply cannot afford to pay the interstate portion of their telephone costs are provided significant protection by the lifeline waiver. The Commission's access charge decision, therefore, need *not* imply *any* threat to the availability of telephone service to the needy, elderly, or other targeted, deserving group of residential telephone ratepayers. It is not unfair, however, to expect ratepayers who can afford the full cost of their access to the local exchange to begin paying rates that more closely reflect these costs.

While I am pleased with the Commission's decision to modify the rate structure for the end-user access charge, I am concerned with the competitive impact of other aspects of the *Reconsideration Order*. In particular, I find three aspects of the *Reconsideration Order* especially troublesome; namely, the impact of access charges on the OCCs, the impact of access charges on the pricing of private line services; and the competitive implications of the Exchange Carrier Association (ECA). I expressed some concern about the first two problems in my Separate Statement to the *Access Order* in December. The last problem, while less immediate in its competitive impact, may prove especially troublesome to the evolution of competition among the independent telephone companies and regional Bell operating companies following divestiture.

The short-term financial impact of the Commission's *Reconsideration Order* on the OCCs will be severe. If the Commission's access charge plan prescribed truly cost-based rates for local exchange access, the financial

[7] See Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure, March 10, 1983, p. 10.

impact of the access charge plan on the OCCs should not be a major public interest concern to the Commission. The proper target of regulatory policy should be the welfare of ratepayers, not the protection of some industry participants from competition, technological change, or business risks in general. It is important to emphasize that the access charges to be paid by the OCCs and other users subject to carrier's access charges beginning in 1984 do *not* reflect just the costs of interconnection and the usage of switching, trunking, and transport facilities of local exchange carriers. For both AT&T and the OCCs, about half of the per minute cost of local exchange access in 1984 will represent a contribution toward the NTS costs of dedicated subscriber lines for business and residential users. While this "subsidy" will be reduced but not eliminated at the conclusion of the six-year transition period, it represents in effect "taxation by regulation" that distorts the pricing of telecommunications services.[8] This pricing distortion not only creates an incentive for inefficient use of telecommunications but also creates potential inequities among different classes of telecommunications users. The incidence of this regulatory taxation is largely unknown and may bear little relationship to the ratepayers' ability to pay, or benefits received, or other principles of fair taxation.

Regardless of the merits of the goals achieved by such regulatory taxation, the level of such taxation, more than the underlying economic costs of network access, will have a major impact on the short-run sustainability of competition in the MTS/WATS market, since such subsidy payments are such a significant proportion of the total effective per-minute cost of network access. However, the absolute size of the interstate amount of the per-minute subsidy, how it is apportioned among carriers and end-users, and how smoothly it is phased-in are all within the control of the Commission. How the Commission implements such regulatory taxation should flow directly from its policies supporting competition in the interstate MTS/WATS market. At a minimum, the Commission's pro-entry policies for the interstate MTS/WATS market should support a transition to higher access charges for the OCCs consistent with its concern for the need for transition periods for other affected users and carriers, e.g., lifeline waivers and phased-in end-user charges for residential subscribers and a similar phase-in of end-user charges for Centrex lines. The Commission's *Reconsideration Order*, however, has in effect prescribed an approximately 100% "flash cut" *increase* in the per-minute cost of access for OCCs beginning in January, 1984, while simultaneously *reducing* AT&T's estimated per-minute cost of access by approximately 17%. This aspect of the Commission's *Reconsideration Order* is puzzling in a rulemaking that has already

[8] Posner, *Taxation by Regulation*, 2 *Bell Journal of Economics* 22-50 (1971).

found open entry and competition in the MTS/WATS market in the public interest.

A more complete assessment of the impact of the *Reconsideration Order* on the OCCs is provided by Table 1. Column (1) arrays values for "OCC NTS Discounts" from zero to 100% in five percent intervals. The OCC NTS discount is defined as the ratio of the total amount of premium access to be paid by AT&T (and other premium interexchange carriers) to the residual industry interstate NTS revenue requirement, estimated to be $6.2 billion (B) in 1984.[9] Columns (2) and (3) show the premium amount and NTS residual at the different levels of OCC NTS discount. Column (4) provides an estimate of the OCCs' share of the NTS residual revenue requirement in 1984, assuming a projected 7% share of the MTS/WATS market in 1984. Column (5) provides an estimate of the NTS residual revenue requirement on a per-minute basis in 1984. A forecast estimate of 127.4 billion "access minutes" for 1984 is assumed.[10] Column (6) provides an estimate of AT&T's premium access charge per minute for 1984 (assuming 118.48 B access minutes for AT&T, i.e., 93% of the industry total of 127.4 B minutes). Column (7) is an estimate of the total AT&T NTS cost per minute in 1984, inclusive of the premium access charge in Column (6). Columns (8) and (9) provide mid-range estimates of the per minute cost of OCC line-side and AT&T trunk-side switching and transport, respectively, in 1984 as provided by the Central Services Organization and filed in CC Docket 78-72 by AT&T. Columns (10) and (11) provide estimates of the total NTS and switching and transport ("traffic sensitive" or TS) costs per minute for the OCCs and AT&T, respectively. Column (12) provides estimates of the differential in total per-minute cost of local exchange access for the OCCs and AT&T in 1984, i.e., the difference between Columns (10) and (11). Finally, Column (13) expresses the estimated cost per minute differential as a percentage of AT&T's estimated total cost per minute in 1984, i.e., Column (12) divided by Column (11) and multiplied by 100.[11]

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[9] Conversion of an AT&T "premium" to an OCC "discount" provides a direct analogy to Rate Element 3 of the ENFIA tariff.

[10] This estimate should probably be considered an "upper bound" for access minutes in 1984. To the extent this assumption is correct, the per minute computations are *downward* biased, i.e., the effective per-minute cost is understated.

[11] The computations of Table 1 should be viewed only as an industry-wide approximation of the financial impact of the *Reconsideration Order* on the OCCs and AT&T. The financial impact on any given carrier will vary depending on the average number of access minutes per line for the specific carrier and the ratio of leased and owned facilities. Table 1 does *not* distinguish between owned and leased facilities which may be subject to different access charges. For example, a carrier using a large number of WATS access lines rather than its own facilities to provide a MTS-equivalent service may find its average access cost per minute to be less than a carrier using fewer WATS lines. It is implicitly assumed in Table 1 that a carrier will pay the same carrier's-carrier charge per

The computations of Table 1 permit a straightforward comparison of the OCC NTS discount in Column (1) with the effective OCC cost per minute discount in column (13) that takes into consideration the estimated TS and NTS costs of network access. Thus, Table 1 shows that the 35% NTS discount adopted by the Commission in the *Reconsideration Order* corresponds to an effective OCC discount of approximately 24%. The significance of this 24% discount is meaningful only in comparison to some estimate of the existing differential between the OCCs' and AT&T's effective access cost per minute. In a letter dated July 18, 1983, and filed in CC Docket 78-72, AT&T summarizes the current ENFIA tariff elements as follows: $33.83 per line per month as a nationwide average for Rate Element 1, the central office connecting facility; $45.24 per line per month for Rate Element 2, the charge for local switching and trunking; and $180.53 per line per month for Rate Element 3, the charge for interstate NTS local exchange costs. The total ENFIA charge per line per month is, therefore, $259.60.[12] If 8380 is taken as an estimate of the industry average number of minutes per ENFIA line per month, then the effective ENFIA average total cost per minute is $0.0310. The current effective ENFIA average cost per minute for TS (inclusive of the central office connecting facility) costs is $0.0094 (i.e., $45.24 plus $33.88 divided by 8380). For NTS costs, the current effective average cost per minute is $0.0215. Since OCC minutes of use are effectively frozen, the average total monthly ENFIA cost of $259.60 is essentially a flat rate such that the effective cost per minute for originating or terminating OCC traffic varies directly with the actual minutes of use. For comparison purposes, a reasonable estimate of the OCCs' current average actual cost per minute pursuant to ENFIA is about $0.01 for TS costs and $0.02 for NTS costs.

In the same AT&T letter, AT&T reports that its current total costs per minute for the equivalent of ENFIA Rate Elements 1, 2, and 3 is $0.0992 or $0.0756 per minute for NTS costs and $0.0236 per minute for TS costs.[13] Thus, the current access cost-per-minute differential between AT&T and the OCCs is approximately $0.0682, i.e., $0.0992 minus $0.0310. This estimated cost-per-minute differential represents about a 68.75% discount from AT&T's current total access cost per minute. The Commis-

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access minute for both leased and owned facilities. To the extent that leased facilities are subject to surcharges rather than carrier's-carrier charges, the per minute computations will tend to overstate that industry-wide effective access cost per minute.

[12] This total current ENFIA charge per line reflects a Message Unit Credit of $30.44 per line per month. Part 69.107(f), (g), and (h) of the Access Charge Rules requires a similar message unit credit to be deducted from the Local Switching element access tariff element if end-users of the interexchange service pay message unit charges.

[13] The comparison of ENFIA rate elements to AT&T's "equivalent" cost per minute is difficult since the quality of interconnection received by AT&T as compared to the OCCs is substantially different.

sion's decision to prescribe a 35% NTS discount for the OCCs in the *Reconsideration Order* has, in effect, reduced on a flash-cut basis this discount from approximately 68.75% to about 24.4%. This sharp reduction in the discount represents an increase in the OCCs' TS costs per minute from about $0.01 to approximately $0.03 and NTS cost per minute from $0.02 to approximately $0.03. In effect, the OCCs' effective access cost per minute will increase by approximately 100% (from an estimated $0.031 to $0.062 per minute) while AT&T's effective cost per minute will be reduced from $0.0992 to an estimated $0.082 per minute, an estimated reduction of $0.017 that represents about a 17% decrease in AT&T's per minute cost of access in 1984.[14] It must be stressed that this 100% increase in the per minute cost of access for the OCCs and a 17% reduction for AT&T beginning in January, 1984, will not be accompanied by any significant increase in the availability of equal access. The main difference in January, 1984, will simply be the drastic shift in the prices that AT&T and the OCCs will pay for their respective types of local exchange access as they presently receive it.

I find it extremely difficult to understand how this sharp realignment in the prices that AT&T and the OCCs will pay for local exchange access supports the Commission's earlier decision in this docket that found competition in the MTS/WATS market to be in the public interest. As Table 1 suggests, even a 100% NTS discount for the OCCs, i.e., AT&T would in effect pay the entire 1984 NTS residual revenue requirement of $6.2 B as a premium amount, would *not* increase but only limit the amount of reduction in AT&T's estimated total cost per minute from approximately $0.099 today to approximately $0.084 while maintaining an estimated 64.3% OCC discount from AT&T's total per-minute cost. This 100% NTS discount would, in effect, roughly maintain the status quo in terms of the existing rates that the OCCs pay under ENFIA, i.e., approximately a 67% discount.

I am not sure, however, that a 100% NTS discount is appropriate or that even the status quo price differential should necessarily be maintained. To the extent that the TS costs of the access charge plan do approximate the underlying economic costs of switching, trunking, and transport, some upward adjustment from ENFIA TS costs may be justified.[15] Moreover, a

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[14] Although the Commission's estimate of residual NTS costs has been revised upward since December, the predicted financial impact on the OCCs seems little changed from what I anticipated in my Separate Statement to the Access Order. See Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure, p. 12.

[15] There remains, however, the difficulty that OCC access minutes per call will on average exceed AT&T access minutes per call as a result of the OCCs' line-side interconnection to the local switch. As Table 1 shows, the per-minute TS costs for the OCCs and AT&T will differ only slightly, i.e., $0.03 vs. $0.032 per minute, which in my opinion may

premium access charge imposed on AT&T sufficient to maintain approximately the existing OCC-AT&T per-minute differential in the cost of access would hamper AT&T's ability to reduce interstate MTS/WATS rates next year when access charges become effective. Some reduction in rates is necessary to begin the transition to interstate MTS/WATS rates that more closely reflect the underlying costs of long distance transmission and switching. Delaying this transition will perpetuate the existing pricing distortions that deny consumers the benefits of interstate rates more reflective of costs. Moreover, delaying the transition will also encourage the wasteful entry of long distance service providers that offer no cost or service advantages over existing suppliers. But to the extent that premium interconnection will still remain largely unavailable to the OCCs by January, 1984, the opportunity cost of such premium access remains and should be fully reflected in the premium that AT&T pays for such access. While I fully recognize the conceptual and practical difficulties involved in estimating the value of premium access, I believe the Commission has nevertheless undervalued AT&T's premium access in both the December *Access Order* and the *Reconsideration Order.* From my review of the record in this docket, a premium amount in the range of $3-4 B appears reasonable[16] and should still permit a non-trivial reduction in MTS/WATS rates.[17]

However, whatever the Commission might determine to be a just and reasonable estimate of premium access and TS costs, there should be a

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disadvantage the OCCs if the premium access charge is undervalued and therefore does not fully compensate for the extra OCC access minutes resulting from unequal local exchange access.

[16] The *Reconsideration Order* remedies one possible defect in the administration of the premium access charge. Defining the OCC NTS discount as d = P/NTS where P is the total amount of the premium access charge and NTS is the total amount of the residual interstate local exchange NTS revenue requirement for 1984, then P = (d)(NTS). If the Commission prescribes an absolute value for the amount of P, then the effective OCC NTS discount will vary inversely with the absolute amount of NTS costs. Thus, if the actual amount of NTS costs to be recovered by carrier's-carrier charges for 1984 exceeds $6.2 B and P is fixed in amount, then d is reduced. The *Reconsideration Order* modifies the December *Access Order* by fixing the level of d at 35% which, in effect, makes P a variable quantity if residual NTS for 1984 differs from the projected level of $6.2 B. This change in the method of implementing the premium access charge, i.e., weighting OCC access minutes by the factor (1 - d) or .65, should help stabilize the OCC-AT&T differential in the per-minute cost of access during the transition to equal interconnection. I strongly support this important technical modification to the Commission's access charge plan.

[17] For example, a 45% NTS discount corresponding to a $2.79 billion premium charge as shown in Table 1 would reduce AT&T's per-minute cost of access from $0.099 today to $0.082 beginning next year. This $0.017 reduction would reduce AT&T's interstate revenue requirement by approximately $2 billion in 1984, i.e., $0.017 per minute times a forecast 118.48 billion minutes.

transition to the carrier access charges corresponding to these estimates not a sudden, flash-cut realignment of rates. The Commission has adopted a complex access charge plan largely in order to accommodate a smooth transition to end-user access charges and to alleviate sudden economic dislocations for affected industry participants, e.g., Centrex service providers, enhanced service providers, and residential end-users. It seems reasonable to treat the OCCs no less fairly than other groups directly affected by the Commission's *Reconsideration Order*. It is worth stressing once again that CC Docket 78-72 began as a market structure inquiry that has already concluded in an earlier phase of the proceeding that competition in the MTS/WATS market was in the public interest. It would seem inconsistent for the Commission in this phase of the docket to nullify, at least for the near term, this earlier finding by altering so substantially the cost of network access to incumbent OCCs and other potential market entrants such that further market growth by these participants will be largely precluded in 1984. I cannot find any justification in the record of this proceeding that would support this policy outcome prior to the general availability of equal interconnection for *all* interexchange carriers.

In my Separate Statement to the *Access Order* in December, I commented on the implications of adding NTS costs to private line rates that historically have not included a contribution to local exchange NTS costs.[18] From the perspective of cost causation, such pricing of interstate private line services has reflected only the costs attributable to providing such dedicated transmission service.[19] In general, interstate private line services made no "contribution" to the cost of local exchange plant that was not directly allocated to interstate private line services. In a sense, private line rates were "subsidy-free" and may have roughly approximated the opportunity cost of such facilities. Unfortunately, since MTS and WATS were *not* "subsidy-free," i.e., these rates made a contribution to the interstate allocation of local exchange NTS costs, powerful economic incentives were created to "bypass" the subsidy by using private line

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[18] While the *Reconsideration Order* focuses on the pricing of local exchange access, the decision carries significant implications for the Commission's international telecommunications policies. More specifically, imposing surcharges and usage-sensitive carrier's-carrier charges on private line services will discourage the usage of private lines and will implicitly encourage the usage of switched network services. The Commission will need to reconcile this aspect of the access charge plan, designed to spread the burden of residual interstate NTS costs, with any prospective policies that may attempt to encourage non-usage-sensitive pricing of private line services provided jointly by domestic and foreign entities.

[19] Whether all costs attributable to private line service have been "properly allocated" to this service category over the years remains a controversial point. No opinion on this issue is implied by the discussion in the text.

channels and private switching capacity that provided MTS-WATS-equivalent services. The basic strategy in the Commission's access charge plan for neutralizing this incentive is to require interstate private line services to begin to contribute to the interstate NTS costs of local exchange service.

It is unfortunate that private line rates must be distorted in order to "even out" the distribution of the subsidy and to reduce the incentive to bypass MTS and WATS. This distortion in private line rates is especially troublesome since the subsidy allocated to private line services is largely transitory, with the exception of contributions to the Universal Service Fund.[20] While private line channels can be used like MTS-WATS services, private lines have inherent technical and economic advantages that transcend straightforward substitutability for switched services. In particular, private lines provide building blocks for meeting specialized user needs including various grades of service. Thus, a private line user can vary certain transmission, switching, and network characteristics to satisfy diverse voice and data requirements. By contrast, MTS or WATS provides a fixed grade of service where the technical service parameters are established by the exchange or long distance carrier, not the user. The quality-of-service flexibility provided by private line services is unavailable.

In short, private line services allow users greater control over their communication links as compared to MTS or WATS. While spreading the burden of subsidy to private line services will help recover local exchange NTS costs, I fear that this short term regulatory strategy will encourage *inefficient* use of switched services, reduce the cost-effectiveness of user-designed and managed network services, and distort the further development of computer and telecommunications technology that is dependent on dedicated private line channels. Imposing surcharges or carrier's-carrier charges on private lines inevitably will result in both static and dynamic losses in economic efficiency.[21]

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[20] In addition, the total amount of subsidy to be collected from resellers, sharers, and other users of private lines–about $1 B–is comparatively small, given the size of the interstate transmission market. A reasonable question is whether the costs of the economic distortions and dislocations resulting from imposing the subsidy on private lines exceed the value of additional revenues collected.

[21] "Second best" welfare economics may suggest that protecting private line rates from "regulatory taxation" may not necessarily prove superior to a policy that "spreads the distortions" over both switched and private line services. Such a static analysis, however, ignores the potential dynamic inefficiencies that such a policy might imply. More important, recent "third best" welfare economics generally supports policies that encourage piecemeal improvements in economic welfare. Thus, distorting private line rates that may already approximate "first best" criteria for efficient pricing may be undesirable. For further discussion of third-best policies, *see Yew-Kwang Ng, Welfare Economics,* Chapter 9 (1980).

In addition to the threshold distortions in the pricing of private line services, the imposition of private line surcharges and carrier's-carrier charges will have substantial second-order effects on the choice of transmission facilities. Although the actual level of special access charges is unclear at present, it is likely that the resale of WATS by the OCCs or other resellers will prove more cost-effective than reselling foreign exchange services to transport interexchange traffic. Moreover, since interstate MTS-WATS-like traffic carried by private lines between reseller or OCC switches will be subject to carrier's-carrier charges at both ends when terminating or originating traffic with an exchange carrier, there may be a reduced incentive to lease such private line channels. This reduction in the usage of private line channels will diminish the availability of different qualities of service to end-users. Moreover, restrictions in the usage of private line channels may contribute to further peak-loads on AT&T's switched network that could be attenuated by the diversion of traffic to dedicated facilities. In addition, there will be incentives for some carriers to attempt to take telex and video service channels and "leak" them into the local exchange, given the exemption of these lines from surcharges and carrier's-carrier charges. In short, the short term distortion of private line rates will provide an incentive for carriers to reconfigure their networks and to adjust their mix of leased and owned facilities, although the underlying economic costs of the affected switching and transmission facilities will not have changed.

While the *Reconsideration Order* attempts to spread the NTS subsidy more evenly among interstate users (or potential users) of local exchange plant, it is sound public policy to affect enhanced service providers as little as possible.[22] In many respects, enhanced services are an "infant industry" segment of the telecommunications industry that only recently has been freed from the confines of regulation and an uncertain regulatory future by the Commission's *Computer II* decision. The development of enhanced services will increase the productivity of industry and the quality of life for consumers. It is a segment of industry where economic growth and rising employment are inevitable. To stifle

[22] The Reconsideration Order properly recognizes the severe rate impact on enhanced service providers if such users were required to begin paying carrier's-carrier charges in 1984 rather than business local exchange rates that such users have customarily paid for local exchange access. Since the interim private line surcharge of $25 is only temporary pending the development of more precise estimates of PBX "leakage" by exchange carriers, the Commission should remain especially sensitive to the effects of the more refined computations of private line surcharges on the further growth and development of the enhanced service market. In short, the Commission should remain alert to the possibility that the access charge transition plan envisioned for enhanced service providers may be quite short as the interim private line surcharge is replaced by surcharges computed by exchange carriers.

such development, even for a brief transition period, seems needlessly wasteful and ultimately self-destructive as enhanced service providers exit the industry, thereby paying neither carrier's-carrier charges nor wages to employees. The *Reconsideration Order* has probably reduced the risk of such a drastic, undesirable outcome. Nevertheless, some risk remains, and the Commission must remain sensitive to the possible negative consequences of its decision to include enhanced service providers within the ambit of its access charge plan.

In distributing the burden of interstate local exchange NTS costs widely, the *Reconsideration Order* has, in effect, perpetuated the historical tendency of the telephone industry and its regulators to adopt inefficient rate structures that incorporate some forms of price discrimination that may not improve consumer welfare. In particular, the access charge plan appears to adopt a price discrimination scheme based on the identity of the user, i.e., end-user, enhanced service provider, WATS reseller, and so forth. Since in many cases the same transmission facility will be tariffed at substantially different rates, there will exist strong incentives for users of local exchange access service to evade the higher priced classification of exchange access. The *Reconsideration Order* recognizes this incentive and largely delegates to the exchange carrier (in paragraph 85) the responsibility to ferret out resellers from other users of exchange access to prevent their escaping the payment of carrier's-carrier charges. As a result, the enforcement cost of the access charge plan, which ratepayers must ultimately absorb, represents still another dimension of the distortion resulting from a strategy of spreading the subsidy far and wide by attempting to plug all "leaky" PBXs, both real and symbolic. The net effect of these pricing distortions on the development of competition in the long distance telecommunications market is unclear at this time. It is clear, however, that the Commission's access charge decision has introduced substantial complexities and uncertainty surrounding the applicable rates for users of local exchange access.[23, 24]

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[23] In the longer term, the Commission may wish to reconsider the basic structure of its access charge plan. One option has been proposed by former Commissioner Jones in her Separate Statement to the December *Access Order.* Commissioner Jones proposed that switched access to the local exchange be defined in terms of facilities actually used or in terms of service parameters rather than the identity of the user. Any user taking line-side switched access to the local exchange (business, residential, carrier, enhanced service provider, or whatever) would take such access pursuant to the *same* tariff. The tariff would reflect both the fixed and variable costs of such access and could include volume discounts such that the marginal price of the usage of network access would decline as a function of the cumulative amount of usage. A tariff of similar structure would apply to premium switched access. Non-switched access for private line services would be tariffed on a flat-rate, non-usage sensitive basis. In brief, Commissioner Jones proposed the adoption of flexible access charge rate structures such as self-selecting, two-part tariffs, rate tapers, and other rate designs suggested by recent theoretical

Finally, I do not think that the *Reconsideration Order* adequately addresses the potential impact of the Exchange Carrier Association (ECA) on the further development of telecommunications competition. In my view, the Commission should encourage competition among exchange carriers for the interstate network access business of competing interexchange carriers. The Commission should also encourage both Bell and independent exchange carriers to compete in other lines of business that such carriers currently or may eventually offer to their subscribers. Unfortunately, the ECA may provide a forum for potentially collusive conduct among exchange carriers. As a possible antidote to such behavior, all meetings of the Board of Directors of the ECA should be open to the public. Moreover, the composition of the Board of Directors should also be amended to include representatives from the interexchange carrier industry.

In short, if the Commission is firmly committed to its pro-competitive policies, it should resist the temptation to fall back on mechanisms of industry cooperation that were the hallmark of the monopoly era of telephony. Industry practices such as revenue pooling or average schedules are all attributes of a monopoly industry, not an industry where technology and public policy have made competition possible and probably inevitable.[25]

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work on efficient rate structures. (A summary of the recent theoretical literature on rate structures is provided by *L. Phlips, The Economics of Price Discrimination* 166-75 (1983).) Commissioner Jones suggested that flexible access charge rate structures would permit state regulators and their local telephone companies to design local exchange access charges that balanced the goals of universal service and avoided the uneconomic bypass to reflect the relative importance of each goal for any given state.

Any NTS costs not recovered in the fixed component could be recovered through volume-based price discrimination built into the usage-sensitive part of the access rate structure. Commissioner Jones proposed that this type of access rate structure be implemented by asserting federal jurisdiction over all NTS and relevant TS costs of local exchange service. Such assertion of federal jurisdiction would greatly simplify the preparation of access tariffs since the distinction between interstate and intrastate access charge tariffs would be eliminated. Commissioner Jones further proposed that all access tariffs be filed with state regulatory commissions pursuant to non-discriminatory federal access rate structure guidelines prescribed by the Commission. Such guidelines would be far simpler and more straightforward than the existing rules the Commission has adopted to implement the current access plan.

[24] Apart from the complexities of enforcing the various classifications of access to the local exchange, the lack of a peak off peak rate structure for network access may discourage the adoption of efficient rate structures by interexchange carriers. Since a substantial part of the "cost" of network access in the early years of the transition plan represents subsidy and not the underlying costs of access, there appears to be no compelling reason why such subsidies must be collected on a uniform, time-of-day basis.

[25] If a competitive market structure is one goal of telecommunications policy, is it really unreasonable to expect any exchange carrier, regardless of size, to determine its costs

While I have reservations concerning the effects of some aspects of the *Reconsideration Order* on the further development of competition in the telecommunications industry, the order reaffirms nevertheless the Commission's major decision last December to introduce end-user access charges. This decision marks a turning point in the evolution of telecommunications competition, and I firmly support this aspect of the decision on reconsideration. Since the thrust of the Commission's accss charge decision on reconsideration should ultimately prove supportive of telecommunications competition and the benefits such competition will offer consumers, I concur in the Commission's decision to adopt the *Reconsideration Order* in CC Docket 78-72.

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and price its services in line with such costs? What on the surface may appear unreasonable or totally unworkable may on closer inspection be entirely sensible if the benchmark is a competitive industry, not a regulated industry largely coordinated by one firm. In a competitive market, even the smallest firm must determine and control its costs of operations and price its products and services accordingly. Thus, what may seem unreasonably burdensome to a regulated firm may be on closer inspection a commonplace management responsibility or cost of doing business to an unregulated firm.

Common Carrier Costs, Allocation of
Common Carrier Interconnection, Carrier to Carrier
Common Carrier Rates, Integration
Common Carrier Rate Structure, Inquiry

Petitions for further reconsideration considered and partially granted. Residential and single line business end user charge deferred unequal access differential increased.
—*MTS/WATS Market Structure*
CC Docket No. 78-72

FCC 84-36

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
MTS and WATS Market Structure	CC Docket No. 78-72, Phase I

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1984; Released: February 15, 1984

BY THE COMMISSION: CHAIRMAN FOWLER ISSUING A SEPARATE STATEMENT; COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT AND COMMISSIONER PATRICK NOT PARTICIPATING.

I. *Introduction*

1. In the *Third Report and Order* in this docket (*Access Charge Order*),[1] we adopted rules to determine the manner in which telephone companies will be compensated for the origination and termination of interstate and foreign telecommunications services. Those rules required that access charges be imposed upon interexchange carriers and end users who lease or use exchange facilities that could be used to complete interstate telecommunications. We identified four primary goals when we adopted the access charge plan set forth in the *Access Charge Order*:

[1] 93 FCC 2d 241, 48 Fed. Reg. 10319 (March 11, 1983), *on recon.* (Reconsideration Order), FCC 83-356, 48 Fed. Reg. 42987 (September 21, 1983), *appeal pending sub nom.* National Association of Regulatory Utility Commissioners v. F.C.C., Case No. 83-1225 (D.C. Cir.) (NARUC v. F.C.C.)

(1) Elimination of unreasonable discrimination and undue preferences among rates for interstate services;

(2) Efficient use of the local network;

(3) Prevention of uneconomic bypass; and

(4) Preservation of universal service.

See Access Charge Order at para. 26. As noted in paragraph 3 of the *Reconsideration Order* that access charge plan "also represented an effort to preserve an opportunity for fair competition during a transition period in which we and the industry work to eliminate existing inequalities in interconnection options offered interexchange carriers."

2. The *Reconsideration Order* reaffirmed our commitment to both the goals of this proceeding as set forth in the *Access Charge Order* and the approach adopted in that *Order* to achieve these goals. On reconsideration, however, we concluded that the public interest required that the access charge plan be modified to offer a more gradual transition to residential subscribers and Centrex-CO subscribers[2] and to distribute access costs more equitably among all categories of persons using a telephone company's access services. In the *Reconsideration Order* we attempted to modify the plan to achieve these results in such a way that none of the underlying goals of this docket was threatened. In thirty-five petitions for reconsideration, users, carriers and state regulators have suggested that we have yet to strike the right balance among these potentially conflicting goals. Most of the formal petitions have restricted themselves to raising issues related to one of three subjects:

(1) the customer access line charge assessed on subscriber lines associated with Centrex-CO service;

(2) the charges assessed for access service for MTS-WATS equivalent services that compete with MTS and WATS; and

(3) the surcharge to be imposed upon interstate WATS lines and some jurisdictionally interstate private lines.

3. Less formal requests to rescind or modify our decision to establish end user charges have also been filed before, during and after the statutory period for the filing of petitions for further reconsideration. This Commission has received over 4,000 letters on that subject since the adoption of the *Access Charge Order* in December 1982. Public officials who have a role in the formulation of telecommunications policy have also directly or indirectly expressed the view that a wider range of alternatives should be considered.[3] This *Order* will address questions relating to end

[2] For a description of Centrex-CO service, see Part III, *infra*.

[3] Such expressions of concern include a letter dated January 18, 1984, from Senator Dole to Chairman Fowler, signed by 31 other United States Senators, requesting, *interalia*, that the Commission defer end user charges for residential and single line business customers.

user charges before describing our resolution of questions that were presented in formal petitions for further reconsideration.

II. *End User Common Line Charges.*

4. We have decided that the end user charges for residential and single-line business customers should be deferred until June 1, 1985. This delay will enable us to conduct supplemental proceedings to devise an exemption for persons who cannot afford to pay any end user charge, reevaluate the transition plan for end user charges, and explore alternative mechanisms to assist customers of small telephone companies. We will also conduct further studies of the elasticity of demand and bypass in order to assist us in making those decisions.

5. At the outset, we stress that we affirm our conclusion in the *Access Charge Order* and the *Reconsideration Order* that a system of flat end user charges to recover NTS costs will best preserve universal telephone service in the long run by deterring uneconomic bypass. See *Access Order* at paras. 30-35; *Reconsideration Order* at para. 8.

6. The *Access Charge Order* established an End User Common Line charge in order to provide a mechanism for recovering interstate subscriber loop costs through fixed monthly charges. We concluded that such fixed charges would achieve the four primary goals of this proceeding. A system of fixed charges would:

(1) Eliminate the discrimination or preferences that result from the inconsistent methods that have been used to recover interstate subscriber loop and private line loop costs;

(2) Promote economic efficiency by eliminating the distortions that inevitably result from the recovery of fixed costs through usage charges; and

(3) Deter uneconomic bypass by removing the incentive for large users to substitute bypass facilities that may be more costly than the local distribution facilities of the telephone companies.

(4) Preserve universal telephone service by avoiding rate increases for remaining telephone company customers that would result from uneconomic bypass.

That letter was served upon all parties to the proceeding. Although this letter was submitted one day before the scheduled Commission meeting to consider petitions for further reconsideration and we normally do not accept submissions in rulemaking proceedings within a seven day period preceding such a meeting, we decided to depart from that practice in view of the highly important nature of the issues to all members of the public and because we recognize the particular institutional concerns of Congress in this case. We decided to accept the letter and to seek public comment upon it before reaching a final decision. *See* FCC New Release No. 17831 (January 19, 1984) (describing tentative decision to defer some end user charges); FCC Public Notice, Mimeo No. 1945 (January 19, 1984) (seeking comment on January 18 letter from 32 United States Senators); FCC News Release No. 17839 (January 25, 1984) (describing final decision to defer some end user charges).

7. At the same time, we recognized that immediate implementation of any plan to recover most interstate subscriber loop costs through fixed charges could, in the absence of adequate safeguards, conflict with the universal service goal that we found to be implicit in Section 1 of the Communications Act, 47 U.S.C. § 151. We observed in paragraph 80 of the *Access Charge Order*:

> Most participants who filed comments in response to the *Fourth Supplemental Notice* apparently agree that encouraging persons to subscribe to local exchange service must be one of the objectives of this proceeding. This is usually described as the "universal service" objective or goal. The term "universal service" has rarely been defined. Most participants apparently agree that "universal service" has existed on a nationwide basis for several years. In the context of this proceeding a "universal service objective" means avoiding actions that would cause a significant number of local exchange service subscribers to cancel that service.

8. A flat monthly charge reflecting interstate subscriber loop costs would represent an increase in the total fixed charge that a subscriber must pay in order to receive local exchange service. We decided that the risk that an increase in fixed costs would cause some subscribers to cancel local exchange service could be avoided by excluding the Universal Service Fund portion of loop costs from fixed charges and by phasing in the fixed charge for other loop costs over a period of years. We modified the original transition plan for phasing in such charges in the *Reconsideration Order*. The modified plan established an initial charge of $2 for residential customers. That charge would be increased to $3 in 1985 and $4 in 1986. Business customers would pay the lesser of $6 or the post-transition charge in those years. A formula was adopted to compute charges during the remaining three years of the transition.

9. We took two other steps to assure that universal service would be protected. Our staff was instructed to develop a monitoring program to detect any unanticipated effects of access charges upon subscriptions to local exchange service.[4] We also decided to conduct a further notice and comment proceeding by the end of the third year of the transition to enable us to evaluate the effects of access charges before implementing portions of the transition plan that could produce residential end user charges in excess of $4 per month. In addition universal service is protected by the creation of a Universal Service Fund to prevent high local exchange service rates in high cost study areas.

10. Most critics of the plan for end user charges have contended that these measures will not be sufficient to protect universal service. However, some of the criticism directed at the plan for end user charges is probably based upon a general feeling that usage charges are inherently

[4] *See* Notice of Proposed Rulemaking, MTS and WATS Market Structure Inquiry (Phase IV), FCC 83-254 (released June 8, 1983). We are not eliminating the safeguards which were provided in prior orders.

more fair than fixed charges. We do not share that perception of fairness. We do not believe that it would be unfair to require every person who can afford to do so to bear the full cost of that person's line to the telephone company's switch. Any method of recovery that shifts some of the cost of such a person's line to other persons imposes an inequitable burden upon the persons who pay those costs.

11. The language and history of the Communications Act obliges us to eliminate discrimination or preferences and to promote economic efficiency when it is possible to do so without impairing other Communications Act goals. We concluded in the *Access Charge Order*, without losing sight of universal service obligations, that an end user charge constitutes the best method of alleviating discrimination or preferences in the existing rate structure while at the same time establishing incentives for a more efficient and productive telecommunications network. See *Access Charge Order* at paras. 90-123. Critics of end user charges have tended to ignore those goals apart from occasional assertions that the efficiency benefits are "theoretical." They have not persuaded us that the generally accepted principle that recovery of fixed costs through usage charges impairs economic efficiency is not applicable to telecommunications.

12. The *Access Charge Order* also found that failure to recover some fixed costs through fixed charges will result in the growth of uneconomic bypass. Such a result would not only impair economic efficiency, but would also lead to increased charges for users of underutilized telephone company facilities. Some critics of our decision have expressed skepticism with respect to that finding. Although no one has been able to present us with the information we would need to devise an end user charge that is calibrated to recover just enough to deter uneconomic bypass at any point in time, we remain convinced that uneconomic bypass is a threat to the vitality of the existing telecommunication network. Even legislative proposals to defer or preclude some or all end user access charges include provisions that purport to provide a deterrent to uneconomic bypass. Legislators who endorsed such proposals have at least implicitly accepted the view that uneconomic bypass is real. We have already concluded that alternative deterrents would not be as effective in achieving the goals of the present Act. We reaffirm our conclusion that some access costs should be recovered through end user charges in the future in order to deter uneconomic bypass.

13. Although past studies of the elasticity of demand for exchange telephone service are less conclusive than would be desirable, such telephone service is very inelastic.[5] This means that telephone service subscription levels will not change significantly with increases in rates,

[5] *See* Analysis of Effects of Federal Decisions on Local Telephone Service ("Analysis") FCC 83-567, released December 21, 1983, for a discussion of elasticity studies.

unless fixed charges are driven up substantially higher than the levels contemplated with end user charges. Thus, claims that no end user charge can be levied without driving many exchange service subscribers away from the telephone system are clearly incorrect.

14. Recovery of Common Line costs attributable to multi-line business subscribers through fixed charges assessed to multi-line business subscribers would not lead to a reduction in universal service. Those costs would not be high enough to cause such a business to forego telephone service. Thus, any reevaluation of our end user charge plan can be limited to charges for residential and single-line business subscribers.

15. Most residential and single-line business customers can also afford to pay at least a portion of their Common Line costs through fixed charges, but an exemption will be required for the minority of subscribers who may not be able to afford any end user charge. When we adopted the *Reconsideration Order* we assumed that an exemption from end user charges could be provided for persons with very low incomes by inviting state commissions or telephone companies to petition for a waiver of end user charges for a clearly defined class or users. *Id.* at para. 13. We also noted that state commissions could remedy this problem in the absence of such an access charge exemption by structuring local exchange service rates to provide a "lifeline" rate that would ameliorate the effects of end user access charges. *Id.* at para. 14.

16. In spite of this invitation, we have received only two petitions for "lifeline service" waivers. The New York Telephone Company and the Pacific Telephone and Telegraph Company each filed waiver applications on September 28, 1983. We have not received any lifeline waiver application from any state commission.

17. The absence of such applications might indicate that the state commissions have already devised local exchange service rate structures that would ensure the availability of an affordable rate for all potential local exchange service subscribers. Our examination of state commission ratemaking practices in the recent proceeding to determine the effects of certain federal decisions indicates that this is not the case. See *Analysis, supra.* Measured service options are not offered to residential subscribers in many exchanges.[6] Many companies that do offer measured service in at least some exchanges do not include a "lifeline" type option that is targeted in an effective manner.

18. We must conclude that it would be unrealistic to assume that all or even most state commissions will devise a local exchange service rate

[6] See Attachment 16 of the Analysis for availability of residential measured service in the former Bell System. Services that are described as a lifeline service usually include a limited number of calls at a fixed rate and accordingly would be described as a measured service option.

structure that will ameliorate effects of end user access charges upon low income subscribers in the near future. It is also unrealistic to expect that all state commissions will adopt lifeline plans for local exchange service tariffs that can be cross-referenced in an interstate access charge tariff in order to establish an exemption from end user access charges that is limited to persons who may in fact need an exemption. We now conclude that it will be necessary for us to define a category of subscribers who would be exempt from end user access charges. The record in the Docket 78-72 proceeding does not provide us with the information we need to define that category and we cannot rely upon our cumulative expertise for this purpose. This agency has not been obliged to devise such categories or to review carrier efforts to devise such categories in the past. Therefore, we must conduct supplemental proceedings in order to devise a rule that will provide an exemption for those persons who might have to disconnect if they were required to pay end user access charges.

19. We also believe a more gradual transition plan to introduce end user charges will be required for persons who would not qualify for an exemption. No exemption formula can identify all persons who might decide to cancel local exchange service in response to a precipitous increase in fixed charges. We have decided that the supplemental proceedings should also be designed to develop additional information with respect to the elasticity of demand for local exchange service. Such information will assist us in establishing an initial charge and fixing the size and timing of increases in order to avoid any negative effect upon the universality of service. It will also assist us in determining the maximum charge that should be established at the end of the transition.

20. We will also develop and analyze additional information with respect to the extent and dangers of bypass. We have received information that demonstrates that large users of interexchange services have the incentive and the means to bypass and that a deleterious effect upon universal service can be expected if such users elect to use bypass facilities. However, we intend to use this additional information to design the transition plan. The end user charges at particular points in the transition should be low enough to avoid any adverse effect upon the universality of service and high enough to produce toll rate reductions that are sufficient to deter uneconomic bypass. We will adopt the suggestion in a January 18, 1984, letter from thirty-two United States Senators that the end user charge for residential and single line business customers be capped at $4.00 until at least 1990.

21. Although we encourage all interested persons to submit information in the supplemental proceedings, we will not rely exclusively upon the submission of more comments to provide the information we need. We are directing our staff to develop plans for further studies and we may seek a

supplemental appropriation in order to obtain assistance from outside contractors.

22. We will also reevaluate our decision to establish an end user access charge plan that is uniform for all telephone companies in all states. The original rules that were adopted in the *Access Charge Order* gave telephone companies some flexibility in determining the portion of subscriber loop costs that would be recovered through end user charges. That *Order* observed: "In areas where bypass is a smaller threat, the more gradual transition permitted by continuing to allow usage recovery (to a maximum) appears to have benefits that outweigh the costs." *Id.* at para. 185.

23. The transition plan was revised in the *Reconsideration Order* in light of our finding that some aspects of the original plan could not readily implemented. Although the revised rules established a uniform transition schedule, we recognized that some departures from that schedule may be required. Paragraph 35 of the *Reconsideration Order* stated:

> This schedule provides less flexibility for carriers to design a transition to respond to threats of uneconomic bypass or reduction in universal service that might warrant a more or less rapid transition in particular places. We believe other devices, such as petitions for waiver or petitions to amend the rules, should be sufficient to enable us to depart from this schedule if unanticipated events warrant such a departure.

24. We still believe it would be inadvisable to permit any telephone company to accelerate a schedule for increases in fixed charges in the absence of a clear and convincing showing that such an acceleration is necessary to prevent massive uneconomic bypass. We do, however, intend to examine alternatives to the waiver procedure for small telephone companies who may not wish to impose the full charges that any new transition rules will permit. The January 18 letter from thirty-two United States Senators has proposed that telephone companies be given the option of imposing or refraining from imposing end user charges in study areas with fewer than 50,000 loops. We intend to consider that proposal and other alternatives that will enable us to develop rules that are responsive to the particular needs of customers of small telephone companies in the supplemental proceedings.

25. Such needs might be met by increasing the assistance that is provided to customers of small companies in high cost areas through the Universal Service Fund. The separations rules that we recently adopted could be amended to assign 80 percent of the loop costs between 110 percent and 200 percent of the national average to the interstate jurisdiction. High cost companies in study areas with fewer than 50,000 loops need more assistance than high cost companies in larger study areas because such companies generally have a smaller base of business subscribers and less flexibility in recovering above average costs without producing adverse effects on residential subscribers. We will issue a

supplemental notice in CC Docket 80-286 in order to obtain the recommendation of the Federal-State Joint Board with respect to such a revision.

26. Supplemental proceedings that are designed to develop a low income exemption, reevaluate the transition plan for end user charges and provide adequate assistance for customers of telephone companies that serve small study areas will be completed by December 1984. In order to provide the telephone companies with time to complete the preparation of tariffs and to provide all interested persons with a statutory 90 days notice before such tariffs become effective, we have decided that the effective date for access charge tariffs that include end user charges for some residential and single line business customers should be deferred until June 1, 1985. We are revising our rules to establish a June-May access year for future access charge filings. We are waiving the Section 69.3(a) requirement that tariffs be filed for an annual period to permit the initial access charges to remain in effect through May 31, 1985.

27. In the *Access Charge Order* at paras. 252-254, we stated that access charges should be targeted to earn a 12.75% rate of return. That statement was meant only to restrict carriers from earning in excess of 12.75%, not to restrain them from earning less. This clarification is important because the delay in residential and single-line business end user charges puts more of a burden on exchange carriers to calculate their charges carefully to meet any enhanced threat of uneconomic bypass. Moreover, they may need flexibility to flow through appropriate reductions in MTS and WATS rates to counterbalance the effect of end user charges upon multiple-line business subscribers. Carriers should not be inhibited in meeting these problems by establishing lower rates that may now be appropriate in light of today's economic climate.

28. We have allowed this kind of flexibility to date. For example, the rate of return for the interstate operations of the Bell System (and all other carriers participating in settlements) had been less than eleven percent for the past two years, and that was not regarded as inconsistent with our requirements in this area.

29. We recognize that our 12.75% prescription may be outdated in view of the significant changes in economic conditions and changes in the structure of the telephone industry that have occurred since the spring of 1981. However, in the *Access Charge Order*, at para. 254, we stated that, "[n]o evidence has been developed in this record that would enable us to predict any future divergence in AT&T and BOC costs of capital." For this reason, we made 12.75 the target for both exchange carriers and AT&T interexchange rates of return, until a different authorized rate of return would be established in subsequent proceedings. The court in *Nader v. FCC*, 520 F.2d 182, 205 (D.C. Cir. 1975), said that " . . . such a prescription cannot remain binding indefinitely without agency reevaluation, especial-

ly during periods of rapidly changing economic conditions." With this in mind, we intend to continue our analysis of rate of return questions in the post-divestiture environment. Exchange carriers and AT&T are facing rapidly changing economic circumstances, including, possibly, different interest rates, equity structures, pressures from competition and risk factors. We shall allow the overall 12.75 to stand while we develop data on these changed circumstances. In the meantime, AT&T and the exchange carriers may continue to file tariffs targeted to earn less than 12.75 percent, but not more than 12.75 percent.[7]

30. Since we will be reevaluating the entire transition plan for end user charges, the existing Sections 69.202-69.204 will be removed from the rules and a new Section 69.202, which describes the end user charges for a 1984-85 period, will be substituted. Sections 69.203 and 69.204 will be reserved for the new transition rules that we will be adopting in supplemental proceedings.

III. *Centrex-CO*

A. *Prior Proceedings*

31. The *Access Charge Order* established different rules for computing End User Common Line charges for residential and business subscribers to local exchange service. Those rules did not distinguish among business customers or business lines.

32. In petitions for reconsideration of the *Access Charge Order*, groups[8] asked this Commission to clarify the treatment that loops used in conjunction with Centrex-CO service would receive under the access charge rules. Centrex-CO is the generic name that these petitioners and the Commission have used to describe a category of service that telephone companies have offered to their customers as an alternative to their leasing or buying a PBX.[9] To provide a Centrex-CO service the telephone company uses a portion of a switch located at its central office. That switch then meets the customer's internal telecommunications needs and serves as the customer's interface with the local and interexchange networks. Each of the Centrex customer's main stations is linked directly to the switch by a subscriber loop, which also carries any exchange or interexchange calls to or from that telephone.

33. As we noted in the *Reconsideration Order*, a reasonable reading of the *Access Charge Order* would suggest that Centrex-CO lines should be counted like any other lines between a customer's premises and the

[7] This does not affect requirements that elements or service categories be targeted to earn the same return.

[8] *See* petitions for reconsideration filed by Ad Hoc Telecommunications Users Committee and International Communications Association.

[9] The BOCs have tariffed these services under such names as ESSX, Centron, and Centraflex as well as Centrex-CO.

local switch that may be used jointly for exchange and interexchange services. *See Reconsideration Order* at para. 42. In their earlier petitions for reconsideration, however, parties had asserted that such an approach, with the concomitant imposition of a minimum monthly flat charge of $4.00 per line,[10] would prove fatal to the service, disastrous to its subscribers and ultimately a threat to universal service. They claimed that because Centrex-CO revenues were used to subsidize exchange service rates and because Centrex-CO customers' abandoning Centrex-CO service would create stranded investment worth millions of dollars, the demise of Centrex-CO would compel substantial rate increases for exchange service. To avoid these results, they proposed that Centrex-CO customers pay a monthly End User Common Line charge no greater than that paid by a customer with a PBX serving the same number of main stations.

34. On reconsideration we rejected the arguments presented by proponents of the PBX trunk equivalency approach to pricing Centrex-CO access lines. *See Reconsideration Order* at paras. 45-46. We did not, however, reject their request for some relief from business line access charges because:

> We cannot be certain that Centrex-CO does not have advantages that may offset the cost of additional lines. The customers cannot make choices that will promote economic efficiency unless both the interstate access charges and the Centrex-CO service rates that are tariffed with the state commissions are priced in a manner that reflects the appropriate costs. Some petitions and other comments, including comments of state commissions, claim or at least suggest that the rates for Centrex-CO service have been set at a level that exceeds intrastate costs attributable to Centrex-CO service in order to provide an additional subsidy for residential local exchange service. In these circumstances, the telephone companies would be deprived of a fair opportunity to compete and the customers and the economy as a whole would be deprived of any benefits that Centrex-CO service may be able to provide if we implemented our access charge plan in a manner that forced customers to abandon Centrex-CO service before the state commissions can reevaluate the rate structures they have adopted.

Id. at para. 47. We concluded that Centrex-CO lines in place or on order on July 27, 1983, the date on which we adopted the *Reconsideration Order*, should be assessed a monthly per line end user charge equal to that assessed residential users.

B. *Further Reconsideration Petitions*

35. Fourteen petitioners, including telephone companies,[11] state commissions,[12] and customers,[13] have requested that we further reconsider

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[10] The *Access Charge Order* would have established a $4 per month minimum charge for business lines in 1984. The business line rate was changed to $6 per month in the *Reconsideration Order.*

[11] *See* petitions for further reconsideration filed by Ameritech, Bell Atlantic, BellSouth, Cincinnati Bell, Northwestern Bell, NYNEX, Pacific and Southwestern Bell.

[12] *See* petitions for further reconsideration filed by Massachusetts and Vermont.

our decision to require Centrex-CO customers to pay per line access charges equal to those paid by residential customers. They assert that our response to their earlier request for relief is illegal, inadequate and based on faulty assumptions.

36. The specific alternatives they recommend are almost as numerous as the petitioners themselves. These alternatives may, however, be grouped into three general categories: (1) those urging delay of any end user charge on Centrex-CO lines;[14] (2) those requesting modification of the Commission plan either by enlarging the group of Centrex lines paying residential rates or by freezing the rates at 1984 levels;[15] and (3) those urging use of the PBX trunk equivalency approach for some or all Centrex-CO lines either temporarily or permanently.[16]

C. *Discussion*

37. On reconsideration we rejected the argument that counting each Centrex-CO line as a line for purposes of assessing End User Common Line charges would create discrimination between Centrex-CO and PBX users. Our reasoning was that if Centrex uses more lines, it necessarily creates more outside plant costs. *Reconsideration Order* at para. 45. The BOCs have now renewed their discrimination argument, asserting that charging for each Centrex line separately, even at a reduced rate, creates an unreasonable discrimination.[17] Northwestern Bell cites *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790 (D.C. Cir. 1982), for the proposition that Centrex-CO and PBXs are "like" services because they are functionally equivalent from the customer's perspective and consequently that differences in rates for equivalent PBX and Centrex-CO systems must be discriminatory. In *Ad Hoc* the sole issue before the court was whether this Commission had correctly applied the functional equivalency test of likeness to compare three regulated interstate services, MTS, InWATS and OutWATS. Northwestern attempts to

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[13] *See* petitions for further reconsideration filed by the American Hospital Association, Federal Executive Agencies, ICA and New York City.

[14] *See* petitions of BellSouth, Massachusetts and Vermont.

[15] *See* petitions of Pacific, Bell Atlantic, Southwestern Bell, NYNEX, Northwestern, GSA and BellSouth.

[16] *See* petitions of Ameritech, GSA, Southwestern Bell, ICA, New York City, Massachusetts, Vermont, BellSouth, Pacific, and American Hospital Association.

[17] In its Opposition, ROLM asserts that we should reject petitions relating to the Centrex-CO issue because petitioners have exhausted their administrative remedies. ROLM is correct only to the extent that on reconsideration we clarified our intent that under the permanent access charge rules Centrex-CO lines should be treated like all other common lines. Insofar as petitioners seek reconsideration of the transition rules governing Centrex-CO lines, however, these petitions are not untimely. Since we modified the rule for computing Centrex-CO line access charges during the six year transition, petitioners may properly request that we reconsider the modification. See 47 CFR § 1.429(i).

compare a PBX, the provision of which is no longer subject to tariff regulation in most instances, with a service that remains under state tariff regulation.[18] The relevant services for purposes of this docket are interstate use of lines between the premises of a PBX or Centrex-CO customer and the telephone company's local switch.[19] A share of the access line costs is allocated to the interstate jurisdiction and become part of the telephone company's interstate revenue requirement. Under the transition plan we adopted in the *Reconsideration Order*, Centrex-CO customers would in fact pay less for each access line they receive than PBX customers would pay in the first few years of the end user access charge transition. Thus, the rate differential which we have found to be reasonable favored Centrex-CO customers.

38. Northwestern Bell presents additional legal arguments to support its position, arguments that we find equally lacking in merit. It raises a constitutional challenge to our treatment of Centrex-CO lines, asserting that it is confiscatory and violates the equal protection requirement of the Fifth Amendment by imposing unequal rules to govern provision of equivalent services (i.e., Centrex-CO and PBXs). These arguments too are premised on the incorrect assumption that the difference between the total end user flat charge for the trunks of a PBX and the loops of a Centrex-CO system serving the same number of main stations is not cost-based. Any alleged impairment to competition between PBX vendors and telephone companies offering Centrex-CO service is justified by the fact that this rate differential is cost-based. Because there are specific provisions in the tax code that cause taxpayers with Centrex-CO systems and taxpayers with private PBXs to pay a comparable Communications Excise Tax, Northwestern infers that our access charge plan is in conflict

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[18] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384, *on recon*, 84 FCC 2d 50 (1980), *on further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Association v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied sub nom.* Louisiana Public Service Commission v. FCC, 103 S. Ct. 2109 (1983).

[19] The "access lines" to which we refer here may be restricted to internal or local use. Nonetheless, because a share of the costs of these restricted access lines is allocated to the interstate jurisdiction and must be recovered through interstate service charges, customers leasing such lines must still pay the prescribed interstate End User Common Line charge. Any other pricing structure results in other customers of interstate services assuming the costs of the restricted lines, in effect subsidizing the service costs of the customer leasing the restricted lines. This Commission has concluded that a rate structure in which the customer causing the cost to be incurred bears that cost is in the public interest because only through such pricing can competition in telecommunications services flourish. We have allowed limited deviations from this principle in the setting of end user access charges. We find any further deviation from the principle of cost causation to be unwarranted. For this reason we deny the requests of BellSouth and GSA that End User Common Line charges for ESSX lines be based on the number of network access registers a customer obtains.

with Congressional intent. We do not believe that any Congressional intent that is relevant to questions presented in this proceeding can be inferred from Internal Revenue Code provisions that were designed for very different purposes. Northwestern Bell also asserts that our treatment of access lines that provide Centrex-CO service is arbitrary and capricious because it is unsupported by the record.[20] It seems to argue that because we did not grant the specific relief requested in earlier petitions, we must have ignored the evidence presented concerning stranded investment and the adverse impact on local rates created by placing an end user charge on each Centrex line. The text of the *Reconsideration Order* makes clear, however, that while our assessment of the problem differed from theirs, the information they provided influenced our decision to offer Centrex-CO customers a more gradual transition than that prescribed for other business customers. *See id.* at paras. 44, 47-49. Ameritech claims that with respect to intercom lines, imposition of an end user charge is inconsistent with the jurisdictional division of regulatory authority defined by the Communications Act.[21] This is nothing more than a variation on the arguments which we repeatedly rejected at earlier stages in this docket that our access charge plan is an intrusion into state ratemaking authority. *See Access Charge Order* at paras. 56-62, *Reconsideration Order* at para. 202.

39. Some petitioners claim that a per line charge on Centrex-CO systems ignores the fact that the average unseparated cost per Centrex-CO line is less than the average unseparated cost of all subscriber lines.[22] This may or may not be true. The *Separations Manual,* however, allocates loop costs between the interstate and intrastate jurisdictions based on the average cost per loop and the number of loops in use in a telephone company's study area.[23] Thus any overallocation of loop costs to one category of loops or group of subscribers occurs during the separations process. As the *Access Charge Order* and our rules make clear, we have taken the interstate revenue requirement for subscriber loops that results from applying the procedures prescribed in the *Separations Manual* as given, and have focused in this docket only upon the recovery of the share of those costs assigned to the interstate jurisdiction. *See Access Charge Order* at para. 259; 47 C.F.R. § 69.104(d).

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[20] *See* Northwestern petition at 9-20.

[21] *See* Ameritech petition at 2.

[22] New York City offers a similar cost argument to support reduced Centrex rates. It argues that since Centrex lines are not used for interstate calls, either because they are restricted or because of the nature of the Centrex customer's business, they have contributed much less than other lines to the SLU on which the interstate share of their costs has been based. The City reasons that since they contribute less to the interstate cost allocation, they should pay less. *See* New York petition at 5-6.

[23] *See Separations Manual* at para. 23. 44.

That share is the same for each loop in the study area, regardless of its length or the original cost of installing a particular loop. Moreover, the access rules are based on average loop costs for all categories of subscribers. There are an infinite number of subscribers who will be paying end user charges and who could also make the argument that they cause fewer costs to be assigned to the interstate jurisdiction than do other subscribers. There is simply no practical way for the Commission to break down average subscriber loop costs for Centrex service without doing the same for other categories of subscribers.

40. None of the arguments that have been presented for treating Centrex-CO lines differently from other lines of multi-line customers at the end of an end user charge transition seems persuasive to us. However, we still believe that a lower initial charge is appropriate and will determine that charge in this proceeding.[24]

41. Our decision to use the residential line rate for 1984 end user charges for most Centrex-CO lines was not based upon a finding that residential and Centrex-CO customers are precisely alike. Our *Reconsideration Order* found that imposition of a $6 charge for such lines would create an undue risk that many Centrex-CO customers would abandon Centrex-CO service before state commissions can correct distortions in their rate structures that would affect competition between Centrex-CO and PBXs. We found that a $2 charge should be low enough to avoid that result. If that assumption is correct, we should retain an initial charge of $2 for such Centrex-CO lines even though the initial charge for residential lines will be zero.

42. Several petitioners claim that an initial charge of $2 is too high to prevent effects that should be avoided.[25] Such petitioners assert that existing customers will abandon Centrex-CO because they cannot expand their systems except at substantial cost to themselves and that new customers will reject it as not being competitively priced. Consequently, they claim the Commission's plan will encourage creation of stranded investment and higher intrastate rates because the transition provided is too short for either states or subscribers to respond rationally. We disagree with petitioner's analyses.

43. This Commission made the decision to grant current Centrex-CO customers a more generous transition to cost-based rates than other business customers in part to enable state commissions to reevaluate

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[24] Appropriate Centrex-CO line charges for subsequent transition years will be determined in the supplemental proceedings which will reexamine transitional end user charges for all customers including multi-line business. We expect that the charge for Centrex-CO lines that are subject to a $2 initial charge will not exceed $3 in the 1985-86 access period.

[25] *See, e.g.* petition of American Hospital Association at 5 and of Southwestern Bell at 3 and replies of New York City at 2 and of NYNEX at 3.

intrastate Centrex-CO rates that might not be based on the associated intrastate revenue requirement. *See Reconsideration Order* at para. 48. We also indicated that we would consider changes proposed by a Joint Board to the separations process or other solutions if it appeared that state commissions could not act to avoid adverse effects upon residential customers arising from a cost-based charge for Centrex-CO customers. *Id.* Petitioners claim that the likelihood of responsive state action is too remote and uncertain to forestall most customers' decisions to abandon their Centrex-CO systems in the next few years. Several repeat their claim that state rates for Centrex-CO already recover the full unseparated costs of most, if not all, of the Centrex-CO lines, adding that the state commissions cannot correct the Centrex-CO rate imbalance without increasing other rates in a manner that will endanger universal service. They conclude that Joint Board relief will be too little, too late.

44. We find it to be still premature to conclude that state commissions cannot respond appropriately to the challenge posed by our decision to require cost-based pricing for all subscriber loops, including those used for Centrex-CO service. For some Centrex-CO customers the charges they may now face arise from rate structure imposed on the service at the state level that does not reflect intrastate costs and it is at the state level that this problem should be addressed.

45. Several petitioners have asserted that our transitional treatment of Centrex-CO lines is premised on faulty assumptions that, if corrected, would lead to our accepting the PBX trunk equivalency formula for determining a Centrex-CO subscriber's total monthly charge.[26] These alleged faulty assumptions include our belief that the states can react to our decision in time to prevent the demise of Centrex-CO.

46. Petitioners assert that customers' abandoning Centrex-CO service will result in unused plant the costs of which must still be recovered from ratepayers. Predicting wholesale abandonment of the service because of the per line end user access charge, they estimate these costs will be substantial. This, they conclude, will threaten universal service by compelling increases in local telephone rates. While some petitioners claims must be classified as unsupported speculation, some petitioners leave the realm of speculation and offer estimates of the revenue loss or financial impact that would result if most Centrex-CO customers replaced this service with PBXs.[27] The analysis offered by these petitioners is flawed in several ways. As NATA notes in its opposition to these petitions, at least some of the abandoned plant would be used to link the

[26] *See, e.g.*, petitions of Bell South at 6 and of GSA at 3; Memorandum attached to Massachusetts petition at 10-11.

[27] *See e.g.*, Bell Atlantic petition at 3; Northwestern Bell petition, Exhibit B at B3; Southwestern Bell petition at 5; Pacific Telephone petition at 5.

PBXs of former Centrex-CO customers to the central office.[28] ROLM adds that testimony in state proceedings indicates that much Centrex-CO investment can be reused in other local service.[29] It also asserts that petitioners' predictions fail to include as a factor the general growth in the demand for telecommunications services in most markets. We conclude that petitioners may have overstated the amount of investment that would be truly stranded, i.e., unusable. Petitioners analyses suffer from two more substantial flaws as tools for estimating the impact of Centrex-CO rate increases on universal service. First, they appear to ignore the fact that Centrex-CO customers are as a practical matter unable to abandon Centrex-CO overnight. The American Hospital Association and ICA indicate that it would take most Centrex-CO customers at least three years to implement a decision to abandon Centrex-CO.[30] That would be three more years to recover the costs of plant now dedicated to Centrex-CO service from Centrex-CO users directly. An even more serious flaw in their analyses is the tacit assumption that state regulators would permit telephone companies to recover the costs of the "stranded investment" through a uniform surcharge on all classes of subscribers, an unlikely result in light of the shared concern about endangering universal service.

47. In the *Reconsideration Order* we stated that we would ask the Joint Board established in CC Docket No. 80-286 to help us identify the nature and extent of any indirect effect on local rates and to develop solutions to that problem that state commissions (or this Commission) might adopt to prevent adverse effects on local residential rates. Nothing in the petitions convinces us that there is a threat to universal service so substantial and so imminent that we must depart from this approach to solving any problems created by responses to the Centrex-CO end user charge we have prescribed.

48. The American Hospital Association (AHA) requests that we permit telephone companies for at least three years to use a PBX trunk equivalency of 15 to 1 in computing end user charges for hospitals subscribing to Centrex-CO. It asserts that failure to grant its request will impose an undue hardship upon these hospitals and on those dependent upon them for vital services. AHA claims that both state and federal governments have recently placed extraordinary pressures on them to hold down the costs of hospitalization.[31] It notes that recent federal

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[28] NATA opposition at 20.

[29] ROLM and NATA cite testimony in a proceeding before the Wisconsin PSC in which Wisconsin Telephone Company, an Ameritech affiliate, took the position that central office equipment can be 100% reused and that outside plant is 80% reusable. ROLM opposition at n. 17.; NATA opposition at n. 10.

[30] AHA petition at 8-9; ICA petition at 2.

[31] These pressures have also been noted in the petition filed by the Massachusetts commission and in letters from Congressmen.

legislation modifies Medicare in such a way that they are compelled to keep all hospital costs as low as possible. It notes that for hospitals particularly, the length of time required to abandon Centrex-CO is greater than most because, as a general rule, they must obtain a certificate of need from state and/or federal agencies before they can begin to consider replacing their Centrex-CO systems with a PBX. AHA believes these factors justify the special treatment it requests.

49. We recognize the valuable services that a hospital provides to the community it serves. This alone does not warrant the general exemption they request, however. We find the better alternative to be for the state commissions to consider reducing the intrastate Centrex-CO service charge for such institutions, particularly in those areas in which the Centrex-CO charges paid by these hospitals may be subsidizing other intrastate service offerings of their telephone company. The state commission is in a better position than we to determine whether undue hardship exists in an individual case. Its decision to grant rate relief for hospital subscribers to Centrex-CO service would also result in shifting costs from them to the members of the community they serve, a more appropriate allocation of costs than could be achieved at the federal level.[32]

50. In summary, we find that while more detailed, the arguments described in the preceding paragraphs remain essentially the same as those presented in the filings that preceded the *Reconsideration Order.* As we explained in that *Order,* our purpose in providing current Centrex-CO customers with a transition plan more generous than that given other business customers was only to delay the full impact of the new rate structure until state commissions could reevaluate the rate structures for Centrex-CO services they have adopted or approved and to allow time for the Joint Board to study this subject. *Id.* at para. 47. We permitted telephone companies to charge their Centrex-CO customers at reduced rates only to enable them to maintain Centrex-CO Service while state commissions and the Joint Board made that reevaluation. Insofar as it created a discrimination between rates charged Centrex-CO customers and other business customers we could find it reasonable principally because it was necessary to prevent Centrex-CO customers from abandon-

[32] We note that an analogous set of concerns has been raised in informal comments filed by orphanages, which claim that the telephone service which they receive is presently classified in local tariffs as business service, and not residential. They argue that much of their telephone service is used by the children residing in the orphanages no differently than residential service. If the service remains classified as business, they claim that because of limited budgets the business end-user charges would be difficult for them to sustain. As is the case of service to hospitals, we believe that the states might best address whether relief might be granted to orphanages, by reclassification of their service or otherwise.

ing the service before the reevaluations could be completed. This rationale cannot be extended, however, to justify reduced rates for lines that were not in use or on order once we had removed any doubt concerning the way we intended that telephone companies compute end user charges for subscriber lines used to provide Centrex-CO services. We also find no justification for a reduction in the initial charge of $2 per line for Centrex-CO lines that were in place or on order on July 27, 1983. We do not anticipate that this rate would rise above $3 in the June 1985-May 1986 period.

IV. *MTS-WATS Equivalent Services*

A. *Background*

51. This Commission determined in 1971 that the public interest would be served by permitting companies other than the traditional telephone and telegraph carriers to offer interstate telecommunications services as common carriers and that telephone companies would be required to provide such other carriers (or "OCCs") with "local distribution" facilities.[33] AT&T subsequently refused to provide MCI with connections to local telephone company switches to enable MCI to provide Foreign Exchange ("FX") service and Common Control Switching Arrangements ("CCSA") service to its customers because it claimed that our *Specialized Carrier* decision did not authorize MCI to provide those services. This Commission ordered AT&T to provide such facilities.[34] Open end access for FX and CCSA services and local exchange service are provided through "lineside" connections to a local switch while "trunkside" connections are used for MTS trunks. MCI designed a service called Execunet that used line side connections to provide a service that is switched at both ends. This Commission's decision holding that MCI was not authorized to provide such an "MTS-WATS equivalent service" was reversed in *MCI Telecommunications Corp. v. FCC*, 561 F.2d 265 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) ("*Execunet I*").

52. MCI paid the telephone companies the same rates for MTS-WATS equivalent access that FX and CCSA customers paid for open end access while the *Execunet I* litigation was in process. We instituted this rulemaking proceeding a few weeks after the Supreme Court denied a petition for writ of certiorari in the *Execunet I* case. The proceeding was

[33] Specialized Common Carrier Services, 29 FCC 2d 870 (1971), *aff'd sub nom.* Washington Utilities and Transportation Commission v. FCC, 513 F. 2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). The term "access service" has been used in this proceeding to describe the origination and termination of interexchange telecommunications by telephone companies. The term "local distribution" was used in Specialized Carrier and other decisions to describe the same activity.

[34] Bell System Tariff Offerings, 46 FCC 413 (1974) *aff'd sub nom.* Bell Telephone Co. of Pennsylvania v. FCC, 503 F. 2d 1250 (3rd Cir. 1974), *cert denied*, 422 U.S. 1026 (1975).

designed in part to determine the access charges that should be paid for MTS-WATS equivalent services.

53. Shortly after we instituted this proceeding AT&T filed a tariff that would have established access charges for the MTS-WATS equivalent services of the OCCs that were much higher than the FX-CCSA open end access charges the OCCs had been paying. AT&T claimed that the charges were computed to establish parity with the access compensation that it paid for MTS and WATS access through the settlements and division of revenues processes. The OCCs contended that the tariff should be rejected because it would create unlawful discrimination between charges for MTS-WATS equivalent access and the charges for identical access arrangements that were provided to FX and CCSA customers. The OCCs also claimed that the proposed charge did not establish an adequate differential for qualitative differences between the interconnection arrangements for MTS and WATS and the interconnection arrangements that were provided for the MTS-WATS equivalent services and that the abrupt and drastic increase in their access costs would destroy emerging competition in interstate telecommunications services.

54. That tariff never became effective. AT&T deferred the effective date in order to conduct negotiations with the OCCs under FCC auspices to develop an interim formula for access charges for MTS-WATS equivalent services. AT&T, GTE and some of the OCCs entered into an agreement, commonly known as the ENFIA agreement, which did establish such an interim formula. That agreement provided that the formula would be used until this Commission or the Congress establishes a system of access charges or until the fifth anniversary of a Commission order approving the ENFIA agreement. This Commission adopted such an order on April 15, 1979.[35] At about the same time we adopted a *Supplemental Notice* reaffirming our commitment to establish a system of access charges for all interstate and foreign services in this docket.[36]

55. After issuing some further supplemental notices and receiving several rounds of comments relating to access charges and other subjects, this Commission adopted the *Access Charge Order*. That *Order* included rules for the computation of access charges for MTS-WATS equivalent services that would replace the ENFIA charges. In the meantime AT&T and the OCCs had conducted intermittent negotiations in an effort to develop OCC access arrangements that would more closely match the access arrangements that are used for MTS and WATS. Although no agreement was reached, AT&T did introduce alternatives known as ENFIA B and C that provide some but not all of the additional features

[35] Exchange Network Facilities (ENFIA), 71 FCC 2d 440 (1979).

[36] Supplemental Notice of Inquiry and Proposed Rulemaking, 73 FCC 2d 222 (1979).

that are provided for MTS or WATS access. The original FX type of access arrangement is now known as ENFIA A.

56. OCC access arrangements were also addressed when AT&T entered into a January 1982 agreement with the Department of Justice to settle a pending antitrust case through the entry of a consent decree. That decree or *Modification of Final Judgment* (*"MFJ"*) was subsequently entered by the United States District Court for the District of Columbia with certain modifications.[37] The *MFJ* requires that the divested Bell Operating Companies (or "BOCs") provide access for the OCCs that is equivalent to the access provided for MTS and WATS. The BOCs must begin to introduce such "equal access" by September 1984 and must provide equal access in all of their exchanges by September 1, 1986.[38]

57. We concluded in the *Access Charge Order* that a differential should be established between OCC access charges for MTS-WATS equivalent services and access charges for MTS and WATS during the transition to equal access. We also concluded that the initial differential should be smaller than the existing differential under the ENFIA agreement because some of the factors that led us to approve the ENFIA agreement as an interim rough justice arrangement are no longer relevant. In particular, we noted that the access charge plan would eliminate disparities in MTS and FX access compensation that partially justified the use of an intermediate rate for MTS-WATS equivalent services.

58. In the *Access Charge Order* we decided that a differential should be established by assessing a premium access charge upon the carriers that provide MTS and WATS in order to reflect the opportunity cost of premium access. We concluded that premium access is of substantial value to any carrier receiving it in view of the fact that only one carrier can be provided with premium access at this time. We also concluded that this premium value will necessarily decline during the conversion to "equal access" and that the premium access charge should, therefore, be reduced in phased steps. We decided to use the interstate CPE costs that will be declining by 25% per year during the 1984-87 period as a basis for computing the premium access assessment.[39]

59. On reconsideration we concluded that applying different weights to premium and OCC access minutes for purposes of calculating Carrier Common Line charges would provide a better mechanism for reflecting

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[37] United States v. American Telephone and Telegraph Co. 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub. nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[38] The *MFJ* permits waivers of this requirement under certain conditions.

[39] The interstate CPE amount has been fixed for periods from January 1, 1983, through December 31, 1987, through the adoption of a separations plan for the phased reduction of the interstate amount. See Amendment of Part 67 of the Commission's Rules, 89 FCC 2d 1, *modified*, 90 FCC 2d 52 (1982).

the value of premium access. We decided that the OCC minutes should be multiplied by .65 for purposes of computing the 1984 Carrier Common Line charges. The *Reconsideration Order* described several factors that led to the selection of this 1984 factor. We noted that the "transitional impact on the OCCs of a reduction in the differential that presently exists under the ENFIA tariff" is a factor to be considered and concluded that a 35% Carrier Common Line differential should "enable OCCs to compete for customers successfully" even though it is smaller than the ENFIA differential. *Id.* at para. 97. A discount factor of 45% is presently used to compute the ENFIA Element 3 charge for the use of non traffic sensitive exchange facilities.

60. We concluded on the basis of the qualitative differences in interconnection for MTS and WATS and the MTS-WATS equivalent services that a 35% Carrier Common Line differential would provide a "reasonable measure" of premium value in 1984. *Id* at para. 104. We attempted to verify that conclusion by calculating a dollar premium by estimating the costs that AT&T would incur to provide MTS and WATS if it did not have premium access. We attempted to calculate both direct costs of offsetting the effects of inferior access arrangements and a price differential to reflect the residual inferiority that cannot be avoided through alternative measures. We found that we could not make precise calculations on the basis of the record in this proceeding and accordingly calculated a range of possible values. We estimated that the range of the opportunity cost of premium access would be $1,673 million to $2,779 million. Preliminary estimates of the 1984 Carrier Common Line revenue requirement indicated that the 35 percent differential for that rate element would result in a premium amount that is near the midpoint of that range.

61. We decided to revise the schedule for phasing out the premium to conform with the *MFJ* schedule for the provision of equal access. Under the revised schedule the .35 differential would be reduced to .23 for 1985, .12 for the period from January 1 to August 31, 1986, and to zero thereafter. *Reconsideration Order* at para. 106.

B. *Further Reconsideration Petitions*

62. Petitions, letters and other presentations of various OCCs vigorously dispute the assumption that a 35 percent Carrier Common Line differential will produce a smooth transition from the current ENFIA differential that will not threaten the viability of interexchange competition. The ENFIA tariff imposes per line charges while the access charge rules require per minute charges. The OCCs note that the minutes per line factor that is used to compute the ENFIA per line charges assumes fewer minutes than a count of OCC ENFIA minutes will produce. Therefore, the current total differential for all three ENFIA elements is considerably

larger than the differential that a 45 percent discount for ENFIA Element 3 would produce. The estimates of the current total differential for all access elements in the petitions range from 57.5 percent (Allnet) to 65-75 percent (Satelco and Lexitel). These petitioners also note that the total differential that would be produced by the application of a .65 factor for purposes of computing OCC Carrier Common Line charges will not produce a total differential of 35 percent because the OCCs will also be paying access charges for the traffic sensitive elements. Their estimates of the total differential for all elements under the *Reconsideration Order* range from 20.5 percent (Allnet) to 26.3 percent (U.S. Telephone).

63. Although MCI estimates that it would have made a small profit in 1983 if the *Reconsideration Order* had been in effect, most OCCs claim that they would have incurred substantial losses and would expect to incur losses in 1984. Some petitioners imply that some existing competitors in the interstate market will discontinue operations if we decline to increase the differential between AT&T and OCC access charges. Similar concerns with respect to the competitive effects of an abrupt change in the differential have been expressed in comments filed by the National Telecommunications and Information Administration (NTIA) and the Department of Justice (Justice). NTIA and Justice observe that the reduction in the differential could have the effect of eliminating competition in the few years before equal access becomes available. Justice concludes that "the possible costs of increasing OCC rates too quickly appear to outweigh the probable costs of increasing the rates too slowly" (Justice Comments at 11). Although Justice says that the competitive effects of a change in the differential cannot be predicted with certainty (Comments at 2), it favors a 1984 differential that is "large enough so that there is no substantial change in the present differential between OCC and AT&T per minute charges."

64. In opposition, AT&T contends that the abruptness of the change should not be a relevant factor in our decision. AT&T says that "to the extent the premium exceeds any legitimate opportunity cost, the premium will subvert the normal play of market forces, artificially raising the prices to AT&T's customers while diverting traffic to less efficient carriers" (Opposition at 5-6). It claims that the ENFIA differential has always been excessive and that the change in the differential would not be abrupt if we had adopted the minutes per line factor that AT&T advocated in prior proceedings.

65. AT&T also asserts that we should discount OCC claims of injury. AT&T alleges that OCCs have misrepresented the effects of past increases in ENFIA charges. AT&T says that some of the OCCs claimed in 1982 that an ENFIA charge in the $200-275 per ENFIA line range "would 'seriously impair' or 'totally eliminate' the OCC industry," but that

OCC revenues and profits increased after the ENFIA charges were increased to that range. (Opposition at 11).

66. Seven OCCs, Combined Network (Allnet), GTE Sprint, Lexitel, MCI, SBS, USTel and USTS, argue that the opportunity cost computation in the *Reconsideration Order* understates virtually every opportunity cost element that was calculated. Their estimates for those elements range from $3.9 to $9.3 billion. MCI claims that another $2 billion should be added for elements that we failed to consider in the *Reconsideration Order*. AT&T claims that the *Reconsideration Order* overestimated the value of the elements that were considered. It has recalculated the same elements of opportunity cost to produce a range of values from $.82 to $1.16 billion

67. NTIA states that the OCC petitioners have identified some "obvious deficiencies" in the *Reconsideration Order* computations, but that the enormous differences in the OCC opportunity cost estimates raise "serious doubts" that any method of computing opportunity costs will be adequate. (Comments at 5). NTIA says that "our own best estimate of the premium—using the Commission's method and the data submitted by petitioners—is so tentative and subject to such wide error that we believe the Commission ought to abandon the whole enterprise and use the ENFIA rate as the basis for starting the transition. . . ." (Comments at 6).

68. A subsequent letter from David J. Markey, Assistant Secretary of Commerce for Communications and Information, clarified the NTIA proposal. That letter states that NTIA is not advocating an ENFIA freeze. NTIA would not use the existing ENFIA differential for 1984 charges. It proposes equal phased reductions from the existing ENFIA differential during the transition to equal access at an equal price and would implement the initial reduction in the differential in 1984.

69. AT&T contends that it would be unlawful to use the existing contractual differential in the future. AT&T argues (Reply at 6):

> It is not the increase from low contractual rates—rates that were depressed as a result of OCC deception and misrepresentation—that must be justified. It is the failure to prescribe a rate structure under which AT&T and the OCCs pay identical rates that must be justified, as the Commission has attempted to do with its opportunity cost analysis.

70. Several petitioners have suggested that we revise the schedule for phasing out the differential. Some contend that the differential should not be reduced to zero on September 1, 1986, because the BOCs are unlikely to meet the *MFJ* deadline (SBS Petition at 17-18; U.S. Telephone Petition at 8). Others note that the independent telephone companies are not subject to the *MFJ* equal access requirement and that this Commission has not completed its proceeding to determine the access arrangements that the independents should be required to provide (Joint Resellers Petition at 12). Some suggest that the phaseout of the differential should be extended

beyond the point that equal access is achieved in order to compensate for marketing handicaps that OCCs must overcome in competing with AT&T (see *e.g.*, USTS Petition at 26-27).

71. Some petitioners have also questioned the assumption that premium value will decrease by one-third by the 1985 calendar year. Lexitel notes that progress to equal access during 1984 may not be substantial (Petition at 30). USTS says that OCCs are likely to experience severe marketing handicaps during the conversion period because some OCC customers in a service area will have equal access facilities and some will not. (Petition at 27-28).

72. AT&T opposes requests to revise the schedule for phasing out the differential. It claims that equal access will be sufficiently universal by September 1, 1986 (Opposition at 22-23). Justice says that it does expect some exceptions to the *MFJ* requirement for equal access in September 1986 and believes that it would be appropriate to extend the phaseout through August 1987 (Comments at 17).

73. AT&T asserts that any exceptions to the *MFJ* requirement that equal access be offered in all BOC exchanges will probably be limited to small, electromechanical offices that "the OCCs have historically had little interest in serving" (Reply at 11-12). AT&T contends that it is important to establish "a defined and certain end to the premium." *Id.* at 12.

C. *Discussion*

74. We still believe that optimal results would be achieved by establishing a differential between access charges for MTS-WATS and access charges for MTS-WATS equivalent services that is equal to the opportunity cost of premium access. A larger or smaller differential would distort the competitive marketplace in interstate telecommunications. An excessive differential could stimulate imprudent or unnecessary investment by existing or new OCCs by generating profits that could not be sustained with equal access at an equal price. A differential that is not sufficient to offset the effects of unequal access could eliminate or at least weaken competitors before equal access arrives.

75. Our decision to defer a substantial portion of the end user charges until mid-1985 increases the risk that an inadequate differential would have an adverse effect upon interexchange competition. Any differential would be applied to a larger revenue requirement. If we retained the *Reconsideration Order* formula for the computation of the OCC charges the total OCC charge per access minute would be increased by over 1.3 cents per access minute. Even if OCC claims that the *Reconsideration Order* would have a devastating effect upon them are somewhat exaggerated, retention of the *Reconsideration Order* formula with an increased Carrier Common Line revenue requirement would pose a real threat to the survival of many of the existing competitors.

76. The probable length of the transition is a relevant factor in selecting an appropriate transitional differential. If the rate differential is going to disappear or diminish substantially in the relatively near future, an excessive differential is much less likely to distort investment decisions.[40] Investments in the provision of MTS-WATS equivalent services will probably be based upon an analysis of OCC prospects under conditions of equal access at an equal price rather than current revenues or profits that reflect a transitory differential in access charges. An insufficient differential during such a period would, however, be likely to have consequences that are very detrimental to the public interest. It would undermine the OCCs' ability to compete at the time opportunities are presented by equal access at an equal price.

77. In these circumstances we would have to be very certain that our prior estimate of premium value is correct in order to retain that formula. We have received extensive comments from many interested parties on the appropriate amount of the differential between access charges for MTS-WATS on the one hand and access charges for MTS-WATS equivalent services on the other. We still believe that, in general, we correctly identified the various factors that should be considered in placing a value on premium access. See *Reconsideration Order* at paras. 104-104, 109-125. However, examination of the comments has convinced us that it would be virtually impossible to place an accurate dollar amount on these factors at this time. The parties have submitted detailed estimates of what they believe to be the appropriate value that we should attach to each of the elements that make up premium access. These estimates vary tremendously, and we can see no way to determine which, if any, of those estimates are more accurate than the others. Our review of the new material contained in the further reconsideration petitions does, however, convince us that the original estimate was not sufficiently precise and that the premium value is larger than our $2.2 billion estimate. We agree with NTIA's conclusion that it is impossible to determine a precise premium value. Therefore, we have decided to adopt NTIA's suggestion that we abandon the effort to calculate premium value and establish a total differential for all relevant access elements that is related to the total differential that is produced by the current ENFIA rates.

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[40] Although OCCs may choose to use line side connections for some services after equal access becomes available, that choice would not affect the disappearance of a differential in rates that reflects the premium value of access that is not available to competitors. An OCC that elects to use a lineside connection when equal access is available will pay a premium rate for the lineside connection. Such an OCC would, however, pay a lower premium rate for Local Switching to reflect differences in switching costs. We will assume that Feature Group D represents equal access in the absence of a contrary finding.

78. We have decided that we should not retain a fixed termination point for a differential in access prices because it is not possible to predict when, or even if, equal access will be available in every exchange that an OCC may choose to serve. A series of proceedings would probably be required to reevaluate differentials for future years if we retained a composite differential that assesses the same rate for equal and unequal access during the transition. Such repetitive proceedings can be avoided by establishing separate charges for equal and unequal access. This approach will produce a composite differential between total access expenses for OCCs and total access expense for carriers that provide MTS and WATS that does reflect the progress toward equal access at a particular time. It will also more accurately reflect the access which a particular OCC receives. A nationwide composite rate that is applied to all OCC access may not reflect relative advantages or disadvantages of particular OCCs that serve different geographic areas.

79. OCCs that receive equal access will pay the same per minute charges that are assessed for MTS or WATS usage as equal access becomes available in each end office.[41] Access charges in end offices not yet converted to equal access shall continue to be assessed at a non-premium rate.

80. If equal access is available but the OCC does not elect to use it, the OCC will normally pay the equivalent of the subelement 1 charge for Local Switching that is described in Section 69.107 and the full equal access charge for other elements. Local Switching charges were designed to reflect cost differences and the transition rules will preserve that differential. We will not, however, require such an OCC to pay the equal access charges for unequal connections if the exchange carrier fails to provide notice that equal access would be available at least six months before such access becomes available.[42] If the exchange carrier fails to provide such notice, the OCC may pay the lesser charge for access that is not an equal access connection until the expiration of a six month period after it in fact receives such notice.

81. We concluded in the *Reconsideration Order* that it would be desirable to avoid an abrupt change from the present ENFIA differential

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[41] Here equal access is assumed to include such transport and intermediate switching as may be necessary to provide equal access to the OCC point of presence.

[42] Six months will be sufficient to enable OCCs to respond to the opportunity for equal access. We recognize that there may be some problems determining the availability of equal access for an OCC and the appropriate interrelationship between notice of availability and the ordering provisions in exchange carrier tariffs. Since we do not know the extent or the scope of these potential problems, we have not attempted to provide specific guidelines. However, we expect the access charge tariffs to address these questions and will carefully review the tariff provisions.

in establishing an initial differential under the access charge rules. We still believe that this is an important consideration.

82. NTIA proposed that we reduce the current ENFIA differential by equal proportions in the years that remain until equal access is achieved. The NTIA proposal assumed a composite rate for equal and unequal access received by OCCs that could be established by using a differential that equals three-fourths of the current ENFIA differential in the first year, one-half of the current differential in the second access charge year and one-fourth of the current differential in the third period. Although we have decided to depart from the composite rate approach, we find considerable merit to the suggestion that we establish an initial differential that is about three-fourths of the existing differential. Such an initial differential should still produce a reasonably smooth transition under the transition procedure we are adopting in this *Order*.

83. Most petitioners estimate that the existing differential for all relevant access elements is about 70 percent. Therefore, a differential of 52.5 percent would be about three-fourths of the existing differential. The use of a .475 factor to compute a non-premium charge for each relevant access element would produce a 52.5 percent differential between premium and non-premium charges.

84. The use of a .475 factor for the computation of non-premium charges would not, however, produce a composite differential of 52.5 percent during the first access year because the OCCs will be receiving equal access connections in some BOC switches during the latter part of that period and will be paying the premium rate for such usage. A modest adjustment in the factor for computing non-premium charges should be sufficient to produce a composite differential of about 52.5 percent during an April 1984-March 1985 period. We estimate that a .45 factor would produce that result.

85. Although the use of a .45 factor to compute per minute charges would produce a smooth transition for most OCCs, that procedure would produce a very abrupt increase in access costs for those OCCs who happen to have usage per line that substantially exceeds the industry average. We have accordingly decided that per minute charge for unequal access should be converted to a charge per line.

86. The use of a per line charge might arguably disadvantage new entrants that will not immediately achieve usage levels that approach the relevant minutes per line factor. Past experience with the ENFIA tariffs, which have always used per line charges for all elements, indicates that per line charges do not create a significant entry barrier. A number of carriers have entered the market while the ENFIA tariff has been in effect and most have apparently succeeded in achieving average usage levels fairly quickly. Any minimal disadvantage that new entrants might

experience is outweighed by the administrative costs that carriers would be likely to incur. The comments of U.S. Telephone filed on January 23, 1984, note that "usage sensitive billing for a lower cost unequal access will require different networking configurations than usage sensitive billing for equal access." It would be wasteful to require arrangements that could not be used for equal access in view of the interim nature of these non-premium charges. Moreover, the inclusion of options would make the preparation of revised tariffs more difficult and could frustrate our desire to make initial access charges effective by April.

87. We have decided that a 9,000 minute per line factor should be used for purposes of computing the initial monthly per line charge. Comments submitted by the CSO and BOCs in the access charge tariff investigation contain an estimate of average OCC usage per line of 8,459. That estimate was based on data provided by OCCs for the 1983 Recalculation of ENFIA minutes. Since average OCC usage per line has tended to increase over time, current average usage per line is likely to be higher than the average usage at the time of the 1983 Recalculation. A 9,000 minutes per line factor should reasonably approximate the current average usage per line for all OCCs. A 9,000 minutes per line factor is also supported by traffic studies cited in Appendix A of the MCI petition for reconsideration. A hypothetical premium charge per access minute for the Carrier Common Line, Line Termination, Local Switching, Intercept and Transport elements will be multiplied by 4,050 (or 45 percent of 9,000) to compute the per line charge that will be used through May 31, 1985.

88. In order to implement this method, we will require all exchange carriers to permit any OCC to order connections upon a per line basis prior to the introduction of equal access. We also rescind the waiver of the transport access charge rules (*see* FCC 83-287, released June 28, 1983) to the extent necessary to implement this transition plan and extend that waiver through May 1985 to the extent that is not rescinded.

89. An annual revision of the per line charges that is based upon the application of the factors that are used to compute the initial charges might not produce a smooth transition. In order to avoid abrupt changes in OCC charges for access we will direct the exchange carriers to compute charges for the period beginning June 1, 1985, by revising the initial per line charge to reflect changes in the Consumer Price Index ("CPI") during the 1984 calendar year. A reduction in the 1985-86 charge might be considered in light of the transition plan we adopt for end user charges in the supplemental proceeding.

90. We plan to institute a proceeding in 1985 to determine whether a different procedure should be used to compute a non-premium charge for

the OCC MTS-WATS equivalent services in subsequent access years.[43] A reevaluation of the procedures for computing such charges may be appropriate for several reasons. The CPI adjustment formula might produce a non-premium access differential that differs from our expectations. It may be necessary to reevaluate the differential if the progress to equal access does not correspond with our present expectations. We also wish to ascertain that the rates are moving toward costs.

91. Although we recognize that there are some differences between OCC access arrangements that are described as Feature Groups A and B in the National Exchange Carrier Association tariffs, both of these options constitute inferior access and we have no basis for determining a different differential for these feature groups. For this reason, both shall be assessed the non-premium charge.

92. We find that the revised premium assessment procedures that we are adopting in this *Order* should produce reasonable transition rates and will achieve equitable results that are consistent with the goals of the Communications Act.

V. *FX and WATS Lines*

A. *FX, CCSA and CCSA Equivalent Services.*

93. The transitional premium differential has been designed to compensate for the advantage that providers of MTS and WATS services enjoy vis-a-vis providers of MTS-WATS equivalent services because equal access is not presently available for the provision of an MTS-WATS equivalent service. Some of the same facilities are used, however, for the provision of services that are neither MTS, WATS nor MTS-WATS equivalent services. For example, an FX service uses the local exchange switch and the subscriber line that is used for MTS, MTS-WATS equivalent and open end WATS service in order to originate or terminate an FX call at the open end.

94. Inasmuch as the differential was designed to reflect the higher quality access available to the providers of MTS and WATS, any premium differential should be reflected in the access charges for those services. The mechanism that we adopted in the *Access Charge Order* would have accomplished that result by assessing a lump sum premium to the providers of MTS and WATS and assessing equal per minute charges for all services that use a common line. We had proposed to apportion that premium assessment to MTS and WATS in a revision of the Interim Cost Allocation Manual that was proposed before we adopted the *Reconsideration Order* in this proceeding. We did not propose to apportion any of the

[43] The CPI formula will, however, be used for the 1986-87 period if that proceeding has not been completed before the 1986-87 access charges become effective.

premium assessment to other AT&T services such as FX that also use local exchange subscriber lines.

95. When we adopted the *Reconsideration Order* the premium assessment was converted to a differential factor. The revised Section 69.205(a) read as follows:

> (a) In 1984 Carrier Common Line charges to carriers that do not receive premium access shall be computed by multiplying the access minutes of use of such carriers by .65.

96. A literal interpretation of that language would lead to the conclusion that the .65 factor was to be applied to all OCC usage including open end access for FX, or CCSA or similar services offered by OCCs and that no discount factor was to be applied to any service, including FX, CCSA or a similar service, that is offered by a provider of MTS or WATS. Such a result does not reflect our intent.

97. The revised rules that we are adopting in this *Order* will establish a non-premium rate for FX-CCSA Open End access. If the FX line or CCSA ONAL terminates in an end office switch that does not have the capability to provide equal access for an MTS-WATS equivalent service the carrier that provides the FX or CCSA service or an end user that orders a line for the purpose of receiving such a service will pay a non-premium rate. If the switch does have equal access capability, the carrier or end user will pay the applicable premium access charges for lineside connections. This method of pricing FX-CCSA Open End access will maintain parity between FX and CCSA customers and customers of MTS-WATS equivalent services that often use identical interconnections.[44] This method of pricing should ensure that the premium assessment will be reflected in rates for services that enjoy a competitive advantage because premium access is not available for OCC MTS-WATS equivalent services.

98. Although we are establishing non-premium charges for FX-CCSA Open End access, we are not prescribing a per line charge for that purpose. Most users of such services probably do have very heavy per line usage, but FX service is also used by low volume users who happen to need a local number in another city. Such persons would be subjected to an unreasonable burden if they were required to pay a per line charge that is designed for OCC MTS-WATS equivalent services. Therefore, we have decided to require that the per line charge for non-premium OCC MTS-WATS equivalent service access be divided by 9,000 to derive an access minute charge for FX-CCSA Open End access.[45]

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[44] The proceeding we plan to institute in 1985 to determine whether a different procedure should be used to compute non-premium charges for MTS-WATS equivalent access will also examine transitional charges for FX-CCSA open end access.

[45] Such access includes access for variations of CCSA service that are not described as CCSA in carrier tariffs. Since FX-CCSA open end access will presumably always use

99. The ARINC petition apparently requests that initial access charges for open end FX access be established at a level that is lower than the access charges for MTS-WATS equivalent services in order to provide FX users with a more gradual transition from the existing charges. Although the *Access Charge Order* would have established parity between the FX-CCSA Open End and the MTS-WATS equivalent charges, we note that ARINC did not ask us to reconsider that decision in the prior reconsideration proceeding. The rules that we adopted in the *Access Charge Order* were designed in part to remedy the longstanding discrimination between rates charged FX and MTS users, thus satisfying one of the central purposes of this proceeding.[46] As early as the *Second Supplemental Notice* we presented a plan to establish parity between FX and MTS rates. 77 FCC 2d 224. The *Access Charge Order* achieved this parity in a way that differed somewhat from the plan described in the *Second Supplemental Notice.* That *Order* required that carrier's carrier charges,[47] including Carrier Common Line charges, be assessed in the foreign exchange for each minute of use that FX service made of that local network. Petitioners have not demonstrated that FX charges that are lower than OCC charges would be warranted.

100. In their petitions, Allnet and ETI ask us to clarify whether we intended to treat FX lines used to extend a reseller's service area differently from those FX lines used by other subscribers. The FX lines about which they inquire are used to carry traffic from the foreign exchange to the reseller's switch at which the call would be routed over the resold MTS/WATS or MTS/WATS-like facilities to its destination. ETI is concerned that our rules could be interpreted to foreclose the assessment of either a surcharge or carrier's carrier charges (other than special access) at the open-end of a reseller's FX line.[48] Allnet requests that we reach precisely this conclusion in order to spare resellers from

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lineside connections, this measurement requirement is not being imposed for an interim arrangement.

[46] Currently, subscribers to interstate FX service pay a charge for the private line linking their premises to the central office at which the line terminates in the foreign exchange (the "open end") determined by the appropriate AT&T Tariff. They also pay charges to the foreign exchange carrier determined by the business line rate under its local service tariff. As a result, FX customers pay substantially less for each minute of use of the foreign exchange's local network than would an MTS customer or the customer of an OCC using that carrier's MTS-like service. In the *Access Charge Order,* we found the disparity between these rates violated Section 202(a) of the Communications Act and expressed our intent that the discrimination and undue preferences created by these disparities be eliminated without further delay. *Id.* at para. 51, n.20.

[47] Besides Carrier Common Line charges, FX service would incur charges associated with the following access elements provided in the foreign exchange: Local Switching, Line Termination, Intercept, Common Transport and Special Access.

[48] ETI petition at 3-5.

paying full FX rates.[49]

101. We did intend that FX lines used by resellers be treated like any other FX lines. The adverse effects upon FX users, including resellers, arising from the revised rate structure for this service should have been anticipated for at least three years. We will deny these petitions insofar as they seek relief in addition to the restoration of parity between FX-CCSA Open End access and access service for the MTS-WATS equivalent services.[50]

B. *WATS Access Lines*

102. We have also decided that we should modify our rules relating to charges for closed end WATS in light of our December 1, 1983, to defer any changes in the separations treatment of WATS access lines until the Joint Board has given this matter further study.[51] The present access charge rules include both closed end WATS access lines and private lines in the Special Access category while the present separations rules include all interstate and intrastate WATS lines and all ordinary subscriber lines in the same separations category. The combined investment in that category is apportioned between jurisdictions through the application of the frozen Subscriber Plant Factor while investment in private lines is assigned directly to the state or interstate jurisdiction.

103. The use of inconsistent apportionment procedures could produce anomalous results that can be avoided by revising the access charge rules to apportion the interstate share of total WATS access line investment to the Common Line element and by assessing the same Carrier Common Line charges for interstate closed end WATS access minutes that are assessed to MTS and open end WATS access minutes.

104. This change will enable us to eliminate the surcharge on WATS closed ends because there will be no need for a surrogate charge inasmuch as WATS users, including WATS resellers, will already be paying the full carrier charges at the closed as well as the open end.

105. Inasmuch as WATS access lines and ordinary subscriber lines will be treated in the same manner for purposes of assessing the Carrier Common Line charges and WATS access line investment will be included in the Common Line revenue requirement, we shall treat such WATS lines like subscriber lines for purposes of assessing End User Common Line charges. A multi-line business rate end user charge will be assessed upon each interstate and intrastate WATS access line. Such charges will be applied to intrastate as well as interstate WATS lines because a portion of

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[49] Allnet petition at 13-15.

[50] This decision has the incidental effect of granting ETI's petition.

[51] That decision will be reflected in our decision in CC Docket 80-286 that was adopted on December 1, 1983. The text of that decision has not been released.

the investment in each intrastate WATS line is apportioned to interstate operations through the separations process.

106. Our decision to assign loop costs on a usage basis at the WATS closed end should not be interpreted as an abandonment of the principle that the cost of lines that are dedicated to interstate services including WATS closed ends should be recovered in a manner that is consistent with direct assignment. We endorse that principle as the most economically efficient approach for telecommunications services. We have decided that this principle should not be implemented immediately for WATS closed ends because further study of the transitional impact of such a charge upon users and carriers is warranted. We expect to receive a supplemental recommendation from the Federal-State Joint Board in CC Docket 80-286 which will reflect such an assessment.

VI. *Special Access Surcharges*

A. *Prior Proceedings*

107. Throughout this proceeding we have sought to develop an access charge plan that balanced the potentially conflicting goals of the Communications Act in a rapidly changing telecommunications environment. This effort led to our presentation of a tentative access charge plan in the *Second Supplemental Notice of Inquiry and Proposed Rulemaking*,[52] our adoption of a substantially revised access charge plan in the *Access Charge Order* and our refinement of that plan in the *Reconsideration Order* and our decision to conduct further supplemental proceedings to reevaluate the transition process for end user charges. We have intended from the outset of this process that all the costs associated with providing access services for interstate and foreign telecommunications would be recovered through a comprehensive system of access

[52] 77 FCC 2d 224 (1980). The Second Supplemental Notice was only one of five notices issued by this Commission during the course of the proceedings in this docket that preceded the adoption of the Access Charge Order. The first Notice of Inquiry and Proposed Rulemaking, 67 FCC 2d 757 (1978), adopted in February, posed the general question whether services like MTS and WATS should be provided under a monopoly or competitive market structure. This was followed by the Supplemental Notice of Inquiry and Proposed Rulemaking, 73 FCC 2d 22 (1979), and the Second Supplemental Notice, in which this Commission posed questions about the regulatory policy that should determine market entry, including appropriate charges to interexchange carriers for the use of exchange facilities to complete their services. In the Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, 81 FCC 177 (1980), we concluded that a general policy of open entry in the domestic MTS/WATS market, including Hawaii, would be in the public interest. Finally in the Fourth Supplemental Notice of Inquiry and Proposed Rulemaking (Fourth Supplemental Notice), 90 FCC 2d 135 (1982), we sought comments concerning adjustments that should be made to the tentative access charge plan in response to industry changes caused by the imminent divestiture of the Bell Operating Companies from AT&T.

charges established by Commission rules. The rules would define the customers from whom specific costs would be recovered and the rate structure under which such customers would be assessed charges to meet these costs. Consequently, changes in the costs assigned to or the associated rate structure for one group of customers would compel changes in costs assigned to and rates charged other groups. Perhaps no clearer example of this interplay can be found than the one offered by the evolving standards for assigning and recovering local network costs from interstate private line subscribers.

108. In the *Second Supplemental Notice* we discussed for the first time in this docket the phenomenon of the "leaky PBX." There we described the phenomenon as follows:

> Private lines can also be used to access local exchanges for the purposes of originating or completing long distance calls. Although private lines are generally described as dedicated, unswitched, point-to-point facilities, they frequently (perhaps even typically) originate or terminate at a private branch exchange (PBX) facility controlled by the subscriber. With a PBX, the private line subscriber has the capability to "patch" an interstate call to off-network destinations in the local exchange. At the local exchange such a call is indistinguishable from a local call, even though the call originated in another state. The off-network connection through the subscriber's PBX utilizes the telephone operating company's local exchange facilities in a manner similar to switched services, but somewhat more extensively. Thus, an interstate call going off-net from a local PBX would have to traverse two subscriber loops, would use station equipment at both ends of the off-net portion of a call, and would be switched from the line side to the trunk side of one local switch and then back from the trunk side to the line side probably at another local switch. While we believe that such off-net use of exchange plant by private lines is extensive, we are not aware of any statistics or measurements which would enable us to quantify such use or to assess the costs which should be attributed to private line service because of off-net local access. It appears reasonable to assume that such additional costs are sufficient to offset any cost savings in bypassing the local switch.

77 FCC 2d at 241 (footnote omitted).

109. The tentative access charge plan presented in the *Second Supplemental Notice* would have allocated non-traffic sensitive (NTS) costs among the private line service category and three switched service categories based upon relative holding time minutes of use. *See id.* at 240-42. The associated private line revenue requirement would have been recovered through an averaged, flat monthly per line charge, while the switched service categories charges would have been based on relative holding time minutes of use. *Id.* at 246.

110. Explaining the rationale behind the proposed allocation of costs, we stated:

> These differences between the various service categories, however, would appear to be far less significant than the basic similarities in their use of [NTS exchange plant, including NTS central office equipment]. In all cases, access is accomplished through the use of local central office facilities, subscriber loops and station equipment. Given these similarities, and given the fact that we cannot quantify any cost differences

> between the different access service categories, we believe that allocating the [NTS investment] . . . on the basis of holding time minutes is the most reasonable solution available to us in accomplishing our goal of achieving approximate parity among the various interstate services. Before adopting a final access charge plan, this Commission will, of course, consider any evidence presented by the participants in their comments that would demonstrate that the different access service categories use [this NTS plant] differently; that the costs associated with such differences can be quantified; and, that these costs differences should be taken into account in our access charge allocations. (footnotes omitted).

77 FCC 2d at 241-42.

111. Although that plan was designed in part to establish equal per minute charges for the use of all lines from the customers premises to an end office, it also assigned line termination costs to private lines that do not terminate in the local switch in order to provide a surrogate for leaky PBX usage charge. Our subsequent determination that all loop costs should be recovered on a per line basis did not make that part of the tentative plan moot. Nevertheless, we decided to refrain from including a leaky PBX surrogate charge in the *Access Charge Order* because we found that leaky PBX traffic would diminish as increased flat End User Common Line charges reduced the incentive to substitute private line service for MTS. *Id.* at 127. On reconsideration, however, we modified the access charge plan to provide a more gradual transition for residential subscribers to full end user common line charges. *See Reconsideration Order* at para. 6. With the reduction in costs to be recovered from residential customers during the early years of the access charge plan came a concomitant increase in the costs to be recovered directly through Carrier Common Line charges and indirectly through MTS rates. This change compelled us to reexamine our decision to impose no "leaky PBX" charge, because:

> Inasmuch as Carrier Common Line charges will be higher than anticipated as a result of the slowed transition to end user charges [to recover fixed costs], failure on our part to include leaky PBX users in the Access charge plan might actually prompt customers to rely even more on leaky PBX configurations to avoid message service rates which incorporate full access costs.

Id. at para. 80.

112. We noted that "leaking" was not confined to PBX users, however. Facilities-based carriers, resellers, sharers, privately owned systems, enhanced service providers, and other private line and WATS customers, both large and small, may also leak traffic into the exchange. Using the term "leaky PBX" to denote this generic problem, we concluded that the most reasonable interim approach to reducing the discrimination in rates for MTS users and these other persons would be to develop a surcharge on private lines and the closed ends of WATS lines. We determined that a surcharge would be imposed on the closed ends of all interstate WATS lines as well as all jurisdictionally interstate private lines

not falling within specifically enumerated exceptions. These exceptions included: (1) private lines subject to carrier's carrier charges; (2) private lines that cannot leak; and (3) certain private lines that can but probably do not leak (*i.e.*, Telex and programming facilities). We established a flat surcharge of $25 per voice grade line for 1984 only because insufficient time remained for the telephone companies to develop a system of surcharges more precisely reflecting actual leakage before the October 3 deadline for filing access service tariffs. *See Reconsideration Order* at para. 88. We expressed our expectation that telephone companies would act to replace the $25 surcharge by such a system of surcharges as soon as possible.

113. We have received fifteen petitions requesting that we reconsider the rules governing the leaky PBX surcharge.[53] They request that we clarify or modify the rules that determine the users who will pay these charges and the amounts they must pay. We have also received a number of responsive filings relating to the surcharge. Some of these filings also advocate changes in the surcharge rules.[54]

B. *The Surcharge Concept*

114. Petitioners who contend that we should not impose a surcharge upon any private line subscriber, including users who do in fact leak traffic into the local network through a PBX, generally contend that the decision to impose a surcharge is arbitrary and capricious or is not adequately supported by the record. See, *e.g.*, RCA petition at 8-10. Some contend that we should not impose any surcharge in the absence of a study of leaky PBX usage. See, *e.g.*, ARINC petition at 21: RCA petition at 8. RCA also claims that the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553(b), require additional proceedings in order to legitimize any surcharge. RCA petition at 10.

115. Some petitioners such as Ad Hoc and IBM, who apparently do not question the concept of a surcharge, do seek reconsideration of our decision to establish an initial surcharge of $25. Questions relating to that computation are not, however, readily severable from questions relating to our decision to establish a surcharge in the absence of actual usage measurements.

116. We were confronted with three choices when we adopted the surcharge concept. First, we could permit leaky PBX users to continue to obtain the same interstate access that MTS customers use without paying

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[53] The following parties filed petitions for further reconsideration raising issues directly related to the surcharge: Allnet, ARINC; Ad Hoc; ALTEL; AP; Bunker Ramo; GSA; IBM; the Joint Resellers; NCTA; RCA; SBS; SICA; U. S. Telephone and USTS.

[54] Comments discussing the surcharge were filed by: Ad Hoc; American Hotel and Motel Association; API; EDS; GTE; and Western Union. AT&T and the BOCs filed oppositions discussing these issues.

the same price. Second, we could direct telephone companies to perform usage measurements that could be costly and difficult in order to ensure that leaky PBX users pay precisely the same amount as the MTS users. Third, we could impose a surrogate charge based upon an estimate of average leaky PBX usage that is necessarily imprecise. We concluded that, at this time, the third alternative is more consistent with the goals of the Communications Act than the other two. The imposition of a modest surcharge that is not based upon actual usage measurements will reduce discrimination or preferences to the maximum extent possible without imposing costly and difficult measurement procedures.

117. We did not reject the second alternative as a long-term solution. We merely concluded that we cannot be sufficiently certain that usage measurement proposals that were submitted in response to the *Second Supplemental Notice* can be implemented without undue cost and difficulty to warrant imposing such requirements at this time. The petitioners who have criticized our decision to impose a surcharge, or the use of a $25 surcharge for the initial access charges, have not submitted any new proposals for usage measurements. On the contrary, some of those petitioners contend that the actual measurement alternative should not be adopted. See *e.g.*, petition of Ad Hoc at 4, BOC opposition at 2.

118. The petitioners who contend that our choice was arbitrary or capricious really seem to be suggesting that a fourth alternative exists that would have been better than the one we selected. Those petitioners have not in fact identified any such alternative. We remain convinced that the adoption of the surcharge concept is the best possible course. A surcharge has become even more necessary in view of our decision to defer some end user charges. The MTS rate reductions may be smaller and the incentive to use a leaky PBX as a substitute for MTS will be greater than we anticipated at the time we adopted the *Reconsideration Order*.

119. We do not find suggestions that leaky PBX usage is too minimal to warrant the imposition of a surcharge persuasive. It is undisputable that wherever products or services that can serve the same function are offered at two different prices, customers or users have an incentive to use the lower priced product or service. The disparities between local exchange service charges and interstate carrier's carrier charges, particularly Carrier Common Line charges for the next few years, create an incentive to disguise interstate use as local exchange use to save money. Private line terminations in a PBX or equivalent switching device provide the ability to disguise interstate use as local exchange use. It is only reasonable to assume that private line customers possessing this capability will take advantage of the opportunity it provides with considerable frequency.

120. The failure of participants to tender any evidence with respect to the actual extent of leaky PBX usage does not justify any inference more favorable to private line subscribers with PBXs than the one we have made. It is the users who would be adversely affected by our decision to impose the surcharge for leaky PBX usage who alone would have been able to provide the information and studies to refute our conclusion. No such studies were submitted in the comments that were filed in response to the *Second Supplemental Notice*, which first proposed a surcharge, and no private user sought leave to supplement the record during the period of more than two years that elapsed between the filing of *Second Supplemental Notice* comments and the adoption of the *Access Charge Order*. No studies have been submitted in the further reconsideration proceeding.

121. We find no merit in contentions that private line customers did not receive adequate notice that a leaky PBX surcharge might be imposed. As previously noted, we first gave notice that we had tentatively decided to impose such a surcharge in April 1980 and we received extensive comments upon that subject in response to the *Second Supplemental Notice*. Private line users had every reason to assume that a surcharge was being actively considered until we adopted the *Access Charge Order* in December 1982.

122. The initial $25 surcharge that we adopted in the *Reconsideration Order* is in fact more modest than the surcharge that was originally proposed. We had originally proposed to assess the same charge upon private lines and other lines for the element that is now described as the Line Termination element. The Line Termination charge in the NECA tariff filed on September 30, 1983, is .7 cents per access minute. If a private line has 8,000 minutes of use, the original proposal would have produced a monthly charge of about $56 per line. The petitioners could scarcely have been prejudiced by our decision to adopt a surcharge that may be less than half of the surcharge described in the *Second Supplemental Notice*.

C. *Surcharge Computations*

123. Petitioners who question the computation of a $25 surcharge have also suggested that the rules be revised to provide more explicit guidance to the exchange carriers for the computation of surcharges. Some have suggested that the surcharge should decline as the Carrier Common Line revenue requirement declines. See, *e.g.*, Petition of IBM at 1; Opposition of UTC at 14; Opposition of GTE at 5. Some have suggested that we establish a credit for message unit charges that are paid for local exchange service in connection with leaky PBX usage. See, *e.g.*, ARINC petition at 21.

124. We agree that further refinements would be desirable, but we have decided that we should obtain further comments before we devise a formula for computing and crediting surcharge revenues in future years. We plan to invite such comments in connection with proceedings to reexamine the transition plan for end user charges and the proceedings to reexamine the rules for transport charges.[55] We have decided to retain a $25 surcharge for the initial access charges. Our *Reconsideration Order* computations did assume a charge for OCC non-premium access that is higher than the charge that will result from the formula we are adopting in this *Order*, but that *Order* also assumed a different standard for designating exempt lines that would have produced average leaky PBX usage per line that is lower than the average usage that will result from the standard we are adopting in the next subpart of this *Order*. A revised computation that takes both changes into account would produce about the same result as the original computation. Thus, any change that we might adopt in the initial $25 surcharge or the crediting of initial surcharge revenues to the Carrier Common Line element on the basis of the present record would unduly complicate the effort to get access charges in place without achieving results that are more precise.[56]

D. *Exemptions*

125. We have already concluded that the surcharges should be limited to private lines in view of our decision to include WATS lines in the Common Line category. A number of petitions have requested that we revise the rules that describe the circumstances in which surcharges will be applicable.

126. Several petitioners request that we revise our rules to impose a surcharge only upon those private lines that in fact leak rather than those having the potential to leak. ARINC suggests that imposing the sur-

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[55] In the *Reconsideration Order* we indicated that we would be initiating a proceeding shortly to determine the appropriate short and long-term rate structure for recovering costs now allocated to the Common Transport and Dedicated Transport elements as well as to develop guidelines for costs that may be recovered from interexchange carriers through non-recurring charges. *Id.* at paras. 137, 145. The relationship between carrier's carrier charges and the surcharge make this proceeding, which is directly concerned with the rate structure for carrier's carrier charges, a logical proceeding in which to address these issues.

[56] We do, however, wish to provide one clarification at this time. In n. 64 of the *Reconsideration Order*, we said that it would "consider allowing local exchange carriers to charge twice the per channel surcharge in cases where the voice-equivalent channel is four-wire instead of two-wire." Asking that we reconsider this statement, IBM emphasizes that a four-wire channel and a two-wire channel of the same bandwidth are equivalent in the amount of two-way conversations each can carry (IBM petition at 7). While the greater cost of a four-wire line may justify a higher basic charge for this line, we agree with IBM that this does not justify a higher surcharge than that imposed on a two-wire channel of equal bandwidth.

charge upon most private lines with this potential, while exempting Telex and program transmission facilities, creates an unreasonable, and therefore unlawful, discrimination among classes of private line subscribers. ARINC petition at 26- 27. ARINC proposes that we adopt a categorical exemption for all services that as a practical matter are not reasonably susceptible to leakage. Others assert that because the Communications Act requires reasonable, non- discriminatory cost-based rates, the surcharge must be restricted to those who actually leak traffic into the local network. *See, e.g.,* SIAC petition at 6; SBS petition at 30; UTS Comments at 8-9. They propose that we permit private line subscribers to avoid the surcharge by certifying that they leak no traffic into the local network. Other petitioners make more modest requests, seeking only that the private lines upon which they rely to meet their unique business needs be made explicitly exempt from application of the surcharge. *See, e.g.,* petitions of Associated Press and Commodity News Services at 9; Bunker Ramo at 6: GSA at 7-13; and SIAC at 4.

127. As we have already explained, we view the surcharge as a tool to reduce the rate discrimination between MTS and the cheaper substitute offered by a leaky PBX. Petitioners have convinced us, however, that we can restrict application of the surcharge to a smaller category of private lines than the category covered by the current rules and still be reasonably certain that the surcharge reaches essentially all those who are using their private lines to configure an MTS substitute. We find that by limiting the application of the surcharge to those private line subscribers who terminate their lines in a PBX or other device with equivalent capabilities, we can ameliorate any unreasonable discrimination between MTS and private line rates, a primary goal of this proceeding, while minimizing the likelihood that surcharges are being imposed on private line customers who do not use these facilities as an MTS substitute.[57] In the *Reconsideration Order* we had extended the surcharge to cover most private line terminations because neither we nor the exchange carriers had any reliable way to determine how private lines are internally configured or interconnected on a private line subscriber's premises. *Id.* at para. 87.

128. Petitioners suggest that customer certification could be used to limit the surcharge's application to certain classes of a private line customers. The exchange carriers apparently find such a standard to be

[57] A private line that terminates in a Centrex or an enhanced service provider's node would be equally capable of leakage. We shall require that a surcharge be imposed whenever a jurisdictionally interstate private line and a local exchange service subscriber line are attached to a device that can interconnect the private line with local exchange service regardless of whether the "leakage" capability exists in customer premises equipment or in a Centrex-CO switch.

acceptable since this is the method proposed in their access tariffs to distinguish those lines to which surcharges do not apply under the current rules from those lines that are subject to the Special Access surcharge. *See, e.g.,* NECA Tariff at section 7.4.2(c), p.426. Accordingly, we shall permit private line customers to be exempt from the surcharge upon their certification to their exchange carrier that their private lines do not terminate in a PBX or are not otherwise interconnected with local exchange service subscriber lines.

129. This revision of our rules does not totally eliminate the possibility that a private line subscriber who leaks no traffic into the local network will still have to pay the surcharge. It does, however, unquestionably reduce substantially the possibility of this occurring. We believe that it is a reasonable interim approach to solving the leaky PBX problem and balancing the goals of this proceeding. We do not believe that it would be reasonable to extend the certification procedure to customers who do have the capacity to leak. The exchange carriers can determine whether a line has been attached to a PBX, but there is no practical way for an exchange carrier to determine whether traffic in fact leaks from a line that is attached.

130. Although the surcharge that was prescribed in the *Reconsideration Order* was limited to Special Access lines supplied by the telephone companies, we recognized that privately owned or interexchange carrier transmission systems can also be connected to a PBX or similar device in order to obtain an MTS or WATS substitute while avoiding payment of either carrier's carrier charges or the leaky PBX surcharge. That *Order* said that we would allow exchange carriers to develop "reasonable, nondiscriminatory surcharges for individual exchange lines that could be connected to private or carrier-provided systems for interstate services." *Reconsideration Order* at para. 86. The National Cable Television Association (NCTA) has asked us to declare that such surcharges may be imposed only to the extent that interconnection in fact occurs and to quantify the magnitude of the surcharge that may be imposed. NCTA petition at 6.

> Memorandum Opinion and Order responding to BSOC transmittal No. 61, at para. 3, released November 4, 1982.

131. This permissive surcharge is described in subsection 69.115(d) which provides:

> (d) A telephone company may propose reasonable and nondiscriminatory end user surcharges to be filed in its federal access charge tariffs and to be applied to the use of exchange facilities which are interconnected by users with means of interstate or foreign telecommunication which are not provided by the telephone company, and which are not exempt from assessment pursuant to Subsection (e) of this Section. Telephone companies which wish to avail themselves of this option must undertake to use reasonable efforts to identify such means of interstate or foreign telecommunica-

tion, and to assess end user surcharges in a reasonable and nondiscriminatory manner.

132. We do not believe that this language could reasonably be interpreted as permitting an assessment for a line that is not provided by a telephone company if a similarly configured telephone company line would not be assessed. For example, a user who truthfully certifies that such a line has not been attached to a PBX or some other device that could be used to divert telecommunications to the local exchange network could not be subject to assessment.

133. We note that no exchange carrier has yet proposed a system of surcharges for common lines connected to non exchange carrier provided interstate transmission facilities. The ability of exchange carriers to develop such surcharges that satisfy statutory and Commission criteria remains uncertain. For this reason it is premature to address the NCTA request that we quantify these surcharges. We also find no evidence to support the fears of NCTA that any state intends to employ an intrastate surcharge as a tax on bypass facilities.[58] While we are, of course, concerned about any state action that adversely affects the development of interstate telecommunications and the technology on which it relies, only if there were evidence in this instance of such state action would it become proper to consider whether action by this Commission to counteract such state action would be appropriate.

E. *Reseller Charges*

134. Several petitions raise questions with respect to the application of the surcharge and other access charges upon carriers that resell interexchange services or facilities of other interexchange carriers. The *Access Charge Order* did not distinguish between resellers and other carriers for purposes of assessing access charges, but the *Reconsideration Order* did exempt the resellers of WATS from carrier access charges. The lines that link a WATS reseller switch with a telephone company end office will continue to be charged at ordinary business subscriber line rates.

135. SBS notes that the *Reconsideration Order* expressed an intent that resellers of WATS and resellers of OCC WATS-type services be treated in a uniform manner. It asserts that access charge tariffs that have been filed do not accomplish that result and requests that we clarify our intent. SBS petition at 23. The resale of "OCC MTS/WATS type services" have been expressly excluded from the assessment of carrier

[58] Taxation questions do not, of course, arise if a surcharge is employed as a surrogate for charges for the use of local exchange facilities. A surcharge upon a facility that is not provided by the telephone company would appropriately be characterized as a tax if the facility were used in a manner that does not create the capacity to leak through a PBX or other device. The rule we have adopted would not permit exchange carriers to impose a surcharge in such circumstances.

access charges in subsections 69.105(a), 69.106(a), 69.107(a), 69.108(a) and 69.111(a) of the rules. We do not believe that any further clarification is needed.

136. ALTEL had requested that we clarify whether WATS resellers must pay an End User Common Line charge for the facilities provided to link their switches to their serving central office. ALTEL petition at 16. Under the *Reconsideration Order,* a WATS reseller would have paid the surcharge on its WATS access lines and could have continued to pay local business rates for the lines through which its local customers reached its switch. ALTEL suggested that the surcharge that the *Reconsideration Order* would have imposed on WATS access lines should be in part a surrogate for End User Common Line charges that would otherwise be imposed on business lines. With the elimination of the surcharge on WATS access lines there should be no question about our intent that all common lines used by multi-line business customers pay the interstate End User Common Line charge.

137. ALTEL has also requested that we permit WATS resellers to choose whether they subscribe to facilities offered under the Dedicated Transport element or regular exchange business lines. It requested that in either case the reseller be required to pay only the tariffed rate for the facilities provided. ALTEL petition at 21. The services that are deemed to be local exchange for this purpose encompass more than transport. Calls to the reseller switch use the end user's subscriber loop and the local exchange switch as well as the line to a WATS reseller switch. Thus, an optional access charge in lieu of local exchange charges could not be limited to transport charges. Therefore, we will deny this ALTEL request.

138. In order to complete their interstate networks, some interexchange carriers rely on WATS lines to supplement their own transmission facilities or the private lines they resell. In theory, under the access charge plan, as modified on reconsideration, traffic carried over the WATS lines leased by these resellers would not be subject to carrier's carrier charges, while the remaining traffic they carry would be assessed such charges. As a practical matter, however, an exchange carrier can not determine the traffic a reseller transmits over its WATS lines as opposed to its other interexchange transmission facilities. If private lines and WATS lines are contained in the same multi-line hunt or rotary group, there is no way to measure the amount of WATS traffic as a percentage of overall interexchange traffic. For this reason, we recognized the need for a special formula to determine the amount of traffic carried over such mixed systems that should be subject to carrier's carrier charges. *Reconsideration Order* at para. 89.[59] We left the development of such a

[59] The revised treatment of WATS access lines and other OCC facilities required by this *Order* does not eliminate the need for such a formula.

formula, at least in the first instance, to the exchange carriers' discretion.[60]

139. Dissatisfied with the formula proposed in the access tariffs filed in October, 1983,[61] the "mixed resellers" request that we take the opportunity in this further reconsideration proceeding to specify a formula defining the minutes of traffic carried over their networks that will be subject to carrier's carrier charges. *See* ALTEL petition at 23-24; Joint Resellers' petition at 19; Allnet petition at 19-24; Telesphere petition at 8; MCI opposition at 14-16. The *Reconsideration Order* can and should be interpreted to require a reasonable proration of mixed system traffic between a reseller's WATS lines and its other transmission facilities. The reasonableness of the particular formula described in an access tariff can and should be determined in the tariff review process. We intend to address the concerns the mixed resellers express about the legality of the formula proposed by the exchange carrier association in the proceeding we have initiated to investigate the lawfulness of all the proposed 1984 interstate access tariffs.[62] Accordingly, we decline to address these issues in this more general rulemaking docket.

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[60] We suggested that a formula similar to that included in BSOC Tariff FCC No. 11 for billing interexchange carriers with mixed systems might be appropriate. *Reconsideration Order* at para. 89.

In the *Memorandum Opinion and Order* denying petitions for rejection and suspension and investigation of BSOC 11 tariffs we explain this billing arrangement as follows:

> Under this arrangement exchange access would be billed either at local exchange business rates or at ENFIA rates based on an allocation of the lines in the combined access group. For the initial two-month period of service, one combined access line would be billed at local exchange business rates for every outward WATS access line the OCC obtains to furnish its resold service. For each and every month following the second month combined access is initiated, the WATS usage of the group would be divided by the billing level requirement (which the parties characterize as a minimum usage requirement) of 2500 minutes to determine the number of lines in the access group eligible for billing at the local exchange business rate. This number could not exceed the number of outward WATS access lines obtained by the OCCs. All other combined access lines would be billed at ENFIA rates.

[61] Under the tariff filed by the exchange carrier association, each interexchange carrier planning to resell interexchange services provided "through the use of originating only Special Access Dedicated Access Line Service" must report the extent of such use to the exchange carrier providing these facilities. "Upon proper reporting of such resale," the exchange carrier would deduct 2500 minutes from the minutes of use relied on to compute the line side switched access charges for each Special Access Dedicated Access Line with at least 2500 minutes of use. See the association's Tariff FCC No. 1 Original at 233-37.

[62] See Memorandum Opinion and Order in Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, FCC 83-470, released October 19, 1983.

VII. *Other Issues*

140. Whenever we conduct a broad rulemaking proceeding like this, until there is assurance that the decisions we have reached are really final *i.e.,* not subject to further reconsideration, the telecommunications industry and those dependent upon it for services must confront a period of uncertainty. Lack of finality to the administrative process can negatively affect the industry's ability and incentive to plan and make investment decisions and can foster confusion and disruption among subscribers. In order to bring finality to our decision making process and to eliminate that debilitating uncertainty, we adopted Section 1.429(i) of our rules. That Section provides:

> The Commission may grant [a] petition for reconsideration in whole or in part or may deny the petition.... Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.

47 C.F.R. § 1.429(i). In their petitions for further reconsideration some petitioners have asked us to reconsider facets of the access charge plan adopted in the *Access Charge Order* that the *Reconsideration Order* left unchanged. For example, ALTEL requests that we eliminate Sections 69.107(f)-(h) of our rules. These sections require an exchange carrier to deduct a credit from a carrier's Local Switching charge whenever customers of its interexchange services must also pay message unit charges on their interstate calls.[63] It urges that such credits be given directly to the customer instead of the carrier. MCI asks us to revise the rules prescribing the rate structure for switching and transport elements to require further unbundling of the traffic sensitive access elements.[64] MCI also renews its legal attack against the creation of an exchange carrier association and asks that we eliminate the association's role in the access charge plan. RCA asks us to specify subelements and associated rates for the Special Access element, a step we have repeatedly declined to take. *See Access Charge Order* at para. 249, *Reconsideration Order* at para. 150. Admittedly, Section 1.429(i) does not mandate denial of these requests. This section, however, clearly reflects a policy of favoring administrative finality in the rulemaking process. We find none of the arguments that petitioners proffer in support of their requests so compelling that they warrant departure from this policy. We are accordingly denying all these requests as untimely or repetitious.

141. In the *Access Charge Order* we had established the Pay Telephone element to which we apportioned an exchange carrier's

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[63] ALTEL petition at 21-23.

[64] MCI petition at 32-33.

investment in pay telephones and appurtenances as well as pay telephone lines. *Id.* at para. 128. We required that the associated interstate revenue requirement be recovered through usage charges imposed only on "sent paid" calls. *See id.*, App. A at 9. Because the majority of all calls placed from pay telephones are collect calls or calls billed to a credit card or a third party, this rate structure would have recovered this revenue requirement from only a minority of the persons using pay telephones. In the *Reconsideration Order*, we revised the rules governing the recovery of these fixed costs to correct this flaw. On reconsideration, we eliminated the Pay Telephone element. *Id.* at para. 58. Costs of pay telephones that could access all interexchange carriers' services would be recovered through common line charges. *Id.* at paras. 58, 60-61. Recognizing that exchange carriers could provide coin or coinless pay telephones dedicated to interexchange services of a single interexchange carrier, we created the Limited Pay Telephone element to which we assigned the investment in such telephones and associated facilities. *Id.* at para. 61. These costs would be recovered through flat monthly charges assessed upon the interexchange carrier requesting this kind of access service. 47 C.F.R. § 69.103.

142. In its petition, American Communications requests that we revise Section 69.103 of our rules "to extend unequivocally the Limited Pay Telephone access service element to coin operated as well as coinless pay telephones which access the service of only one interexchange carrier." American Communications petition at 14. No revision of the rule is needed, however, to achieve this result. Section 69.102 already includes such coin operated pay telephones. A closer reading of American Communications petition reveals that the relief it is really seeking is authorization to interconnect customer provided, coin activated pay telephones to the local and interstate telephone network. Because this is so clearly outside of the scope of this further reconsideration order, we deny this request.

143. Lexitel asserts that the *Reconsideration Order* failed to include an assessment of the impact upon small businesses, like Lexitel, of the recalculated premium and the use of access minutes for computing carrier's carrier charges.[65] The Order makes abundantly clear, however,

[65] Lexitel asserts that such an analysis is required by the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* This is incorrect. In the Access Charge Order we concluded that the Regulatory Flexibility Act was apparently designed to protect only those small businesses directly subject to administrative rules rather than those indirectly affected by the results produced by these rules. *Id.* at para. 359. Consequently, only exchange carriers might claim protection under the Act. Because each exchange carrier, no matter how small, holds a dominant position in its local service area, we held that even they could not claim such protection. *Id.* at para. 360. No party seeking reconsideration of the Access Charge Order, including Lexitel, challenged this analysis of the Regulatory

that we weighed the effect of both these modifications upon the OCCs and competition in the interstate communications services market. *See, e.g.*, para. 97 (premium set to enable OCC's to compete successfully), paras. 103-104 (weighing effect of access minutes in adjusting premium); para. 105 (premium set to reflect increased transport charges anticipated by OCCs); para. 125 (adjustment to premium needed to offset use of access minutes).

144. The radio common carriers (RCCs) have also asked for clarification of their status under the access charge plan. They note that neither the *Access Charge Order* nor the *Reconsideration Order* include any reference to them and infer that we did not intend that exchange carriers be compensated through access charges for the interconnection services they provide to RCCs. They seek clarification now only because the association and several exchange carriers have filed interstate access tariffs with us under which they propose to provide interconnection services to the RCCs.

145. Traditionally the RCCs and the exchange carriers have negotiated contracts to govern the terms for interconnection of their services.[66] In CC Docket No. 79-318 we decided that the use of intercarrier agreements to define the terms for interconnection of RCC and telephone company facilities should be extended to include interconnection of cellular systems to the local network.[67] When we adopted Part 69 to govern access charges for interstate and foreign access services, we did not intend to reverse or to revise the *Cellular Order* or to require that the preexisting intercarrier

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Flexibility Act. Having determined that the access charge rules "will not have a significant economic impact on a substantial number of small entities," we certified that the requirements of the Act did not apply to the access charge rules. *Id.* at 358. Once such certification is made, the requirement of a regulatory flexibility analysis imposed under Sections 603 and 604 of the Regulatory Flexibility Act does not apply to either the proposed or the final rule. See 5 U.S.C. § 605 (b).

[66] *See* Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service Under Part 21 of the Commission's Rules (Domestic Public Land Mobile Radio Service), 63 FCC 2d 87, 88 (1977); Interconnection Between Wireline Telephone Carriers and Radio Common Carriers Engaged in the Provision of Domestic Public Land Mobile Radio Service under Part 22 of the Commission's Rules (Memorandum of Understanding), 80 FCC 2d 352 (1980). Telocator states that the exchange carriers have refused to renew the Memorandum of Understanding on which these contracts are based and which expired in August, 1983. See Telocator Comments filed in Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, at n.5.

[67] Report and Order in An Inqury Into the Use of the Bands 825-845 MHZ and 870-890 MHZ for Cellular Communications Systems, and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems (Cellular Order), CC Docket No. 79-318, 86 FCC 2d 469; modified, 89 FCC 2d 58; *further modified*, 90 FCC 2d 1982; *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir, dismissed January 17, 1983).

agreements between RCCs and telephone companies be replaced by access tariffs.

146. In neither the *Access Charge Order* nor the *Reconsideration Order* did we explicitly address the status of RCCs under Part 69. A review of these *Orders* and the access charge rules, however, makes clear that we did not intend that access charges filed in compliance with Part 69 be imposed upon RCCs providing cellular mobile services in particular, or two-way mobile service and paging services generally. This conclusion is applicable to all carriers in the public mobile service.

147. The access charge plan calls for recovery of costs associated with originating and terminating interstate telecommunications from end users and interexchange carriers. In Section 69.5 we describe persons upon whom access charges are to be imposed. End user charges shall be assessed upon end users, as that term is defined in the rules. 47 C.F.R. § 69.5(a). Carrier's carrier charges shall be assessed upon interexchange carriers that use local exchange switching facilities in the provision of interstate or foreign telecommunications services.[68] 47 C.F.R. § 69.5(b). Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not already assessed upon such usage. 47 C.F.R. § 69.5(c).

148. RCCs are not end users except to the extent that they use exchange facilities for administrative purposes. As the *Reconsideration Order* makes clear, the surcharges described in Section 69.5 shall apply only to certain jurisdictionally interstate interexchange lines. *Id.* at para. 82. The facilities provided to RCCs do not fall into that category.

149. The remaining question is whether RCCs are interexchange carriers for purposes of Part 69. The RCCs provide "exchange service" under Sections 2(b) and 221(b) of the Communications Act, and we have consistently treated the mobile radio services provided by RCCs and telephone companies as local in nature. *See, e.g., FCC Policy Regarding Filing of Tariffs for Mobile Service*, 53 FCC 2d 579 (1975); *Public Notice: FCC Announces New Policy Regarding Filing of Mobile Tariffs*, 1 FCC 2d 830 (1965); *Cellular Order*, 86 FCC 2d at 483-84, 504. Furthermore, mobile radio services are provided by divested BOCs under the *MFJ* and are specifically defined as "exchange telecommunications services" for that purpose. *Memorandum of the Court*, Cir. No. 82-0192 (D.D.C.

[68] Some charges such as Special Access charges and surcharges that are generally described as "carrier charges" will, of course, be assessed to end users in some circumstances. In certain instances, such as resale of WATS or OCC WATS-type services, resale carriers are treated as end users and thus pay local exchange business charges and the End User Common Line charges that are assessed to multi-line subscribers.

November 1, 1983), slip. op. at 4-6. Like wireline telephone companies, RCCs provide interstate services only to the extent that their facilities may be used to originate or terminate toll calls. We conclude that they are not and should not be treated as interexchange carriers under Part 69.

150. We expect to issue an order shortly in the companion CC Docket No. 83-1145, which is an investigation of the filed access and divestiture related tariffs. In order to avoid burdensome duplicative filings, we will establish specific filing requirements for revisions needed to comply with this decision in that order, in addition to any other changes found necessary. Carriers should prepare themselves to make changes in their filed access tariffs, but should defer requests for waivers or special permissions until we have announced specific procedures in the Docket 83-1145 order.

VIII. *Ordering Clauses*

151. Accordingly, IT IS HEREBY ORDERED, That pursuant to 57 U.S.C. §§ 154(i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. § 533 the *Reconsideration Order* adopted in this proceeding is modified to the extent set forth in this *Memorandum Opinion and Order.*

152. IT IS FURTHER ORDERED, That the petitions for further reconsideration or clarification are granted to the extent set forth in this *Memorandum Opinion and Order,* and are otherwise denied.[69]

153. IT IS FURTHER ORDERED, That the Motion to Accept Late-Filed Pleading filed by the GTE Corporation is granted.

154. IT IS FURTHER ORDERED, That Part 69 of the Commission's rules is amended as set forth in Appendix A, effective on the day following their publication in the *Federal Register.* We find good cause for requiring an effective date earlier than thirty days following publication in the *Federal Register.* This good cause arises from the need for telephone companies to file tariffs to be effective on or before April 3, 1984 that are based on the access charge rules as revised by this *Memorandum Opinion and Order.*

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A

Part 69, Chapter 1 of Title 47, Code of Federal Regulations, is amended as follows:

[69] This includes the petition for clarification of Riggs National Bank filed December 5, 1983. That request for clarification is moot in view of the changes we are making in the surcharge exemptions.

1. Section 69.3 is amended by revising paragraphs (a), (b), (e)(6) and (e)(8) to read as follows.

69.3 Filing of access service tariffs.

(a) A tariff for access service shall be filed with this Commission for an annual period. Such tariffs shall be filed so as to provide a minimum of 90 days notice with a scheduled effective date of June 1.

(b) The requirement imposed by paragraph (a) of this Section shall not preclude the filing of revisions to those annual tariffs that will become effective on dates other than June 1.

* * * * *

(e) * * *

(6) A telephone company or companies that elect to file such a tariff for any annual period subsequent to May 31, 1985 shall notify the association not later than November 30 of the preceding year if such company or companies did not file such a tariff in such preceding period or cross-referenced association charges in such preceding period that will not be cross-referenced in the new tariff.

(7) * * *

(8) To enable the association to prepare an access tariff for each annual period subsequent to May 31, 1985, each telephone company shall notify the association no later than November 30 of the preceding year of the projected average number of private line terminations and any other lines that would be subject to the special access surcharge.

2. In Section 69.5, paragraph (c) is revised to read as follows:

69.5 Persons to be assessed.

* * * * *

(c) Special access surcharges shall be assessed upon users of exchange facilities which interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage. As an interim measure pending the development of techniques accurately to measure such interconnected use and to assess such charges on a reasonable and nondiscriminatory basis, telephone companies shall assess special access surcharges upon the closed ends of private line services pursuant to the provisions of Section 69.115 of this Part.

3. In Section 69.105, paragraph (b) is revised to read as follows:

69.105 Carrier Common Line.

* * * * *

(b) A per minute charge shall be computed by dividing the revenue requirement for the Carrier Common Line element by the projected annual access minutes of use for all interstate and international services that use local exchange switching facilities and are subject to charges under paragraph (a) of this Section. Each minute of use of any local exchange switch by such services shall be counted for purposes of computing and assessing this charge.

4. Section 69.115 is amended by revising paragraphs (a) and (c) and adding paragraph (e)(6) to read as follows:

69.115 Special Access Surcharges.

(a) Pending the development of techniques accurately to measure usage of exchange facilities which are interconnected by users with means of interstate or foreign telecommunications, a surcharge which is expressed in dollars and cents per line termination per month shall be assessed upon users that subscribe to private line services which are not exempt from assessment pursuant to paragraph (e) of this Section.

* * * * *

(c) If the association, carrier or carriers that file the tariff are unable to estimate such average usage for a period ending May 31, 1985, the surcharge for such period shall be twenty-five dollar ($25) per line termination per month.

* * * * *

(e) * * *

(6) Any termination of a line that the customer certifies to the exchange carrier is not connected to a PBX or other device capable of interconnecting a local exchange subscriber line with the private line.

* * * * *

5. Section 69.201 is revised to read as follows:

69.201 General.

Notwithstanding Sections 69.4, 69.104-69.108, and 69.111-69.112, charges for the access elements described in this subpart shall be computed in accordance with this subpart during the period commencing January 1, 1984 and ending May 31, 1990. This subpart does not supersede paragraphs 69.107(f)-(h).

6. Section 69.202 is revised to read as follows:

69.202. Initial End User Common Line Charges.

(a) End User Common Line charges shall be computed in accordance with this Section for any period prior to June 1, 1985.

(b) An End User Common Line charge that is the lesser of the charge computed pursuant to paragraph 69.104(d) or $6 shall be assessed for each local exchange service subscriber line except;

(1) a residential line;

(2) a single line business line;

(3) a line used for Centrex-CO service that was in place or on order on July 27, 1983.

(c) A charge that is the lesser of the charge computed pursuant to paragraph 69.104(d) or $2 shall be assessed for each line used for Centrex-CO service that was in place or on order on July 27, 1983.

(d) No End User Common Line charge shall be assessed for any residential line or any single line business line.

(e) A line shall be deemed to be a residential line if the subscriber pays a rate for such line that is described as a residential rate in the local exchange service tariff.

(f) A line shall be deemed to be a single line business line if the subscriber pays a rate that is not described as a residential rate in the local exchange service tariff and does not obtain more than one such line from a particular telephone company.

(g) A charge that is computed in accordance with paragraph (b) of this Section shall be assessed for each WATS access line that is used for interstate or intrastate WATS.

7. Sections 69.203 and 69.204 are removed.

8. Section 69.205 is revised to read as follows:

69.205 Transitional Premium Charges.

(a) Charges that are computed in accordance with this section shall be assessed upon interexchange carriers or other persons that receive premium access in lieu of carrier charges that are computed in accordance with Sections 69.105-69.108 and 69.111-69.112 of this Part if any carrier or other person does not receive premium access. For purposes of this subpart, a carrier or other person shall be deemed to receive premium access if access is provided through a local exchange switch that has the capability to provide access for an MTS-WATS equivalent service that is substantially equivalent to the access provided for MTS or WATS, except that access provided for an MTS-WATS equivalent service that does not use such capability shall not be deemed to be premium access until six months after the carrier that provides such MTS-WATS equivalent service receives actual notice that such equivalent access is or will be available at such switch.

(b) The transitional premium charges for the Carrier Common Line, Line Termination and Intercept elements shall be expressed in dollars and cents per access minute. Such charges shall be computed by dividing the premium revenue requirement for each such element by the projected premium access minutes for such element. The premium revenue requirement shall be computed by subtracting the projected revenues from non-premium charges attributable to such element from the revenue requirement for such element.

(c) The transitional premium charges for the Local Switching element shall be expressed in dollars and cents per access minute. The charge for a premium access minute that would be described as an LS 2 minute in Section 69.107 shall be computed by dividing the premium Local Switching revenue requirement by the sum of the projected LS 2 premium access minutes and a number that is computed by multiplying the projected LS 1 premium access minutes by .65. The charge for a premium access minute that would be described as an LS 1 minute in Section 69.107 shall be computed by multiplying the charge for an LS 2 premium access minute by .65. The premium Local Switching revenue requirement shall be computed by subtracting the projected revenues from non-premium charges attributable to the Local Switching element from the revenue requirement for such element.

(d) Transitional premium charges that are computed in accordance with applicable requirements shall be assessed for the Transport element or elements. Such premium charges shall be designed to produce total annual revenue that is equal to the premium transport revenue requirement. The premium transport revenue requirement shall be computed by subtracting projected revenues from non-premium charges attributable to the transport element or elements from the revenue requirement for such element or elements.

9. A new Section 69.206 is added to read as follows:

69.206. Transitional Non-Premium Charges for MTS-WATS Equivalent Services.

(a) Charges that are computed in accordance with this section shall be assessed upon interexchange carriers that provide MTS-WATS equivalent services for access that is not deemed to be premium access in lieu of carrier charges that are computed in accordance with Sections 69.105-69.108 and 69.111-69.112. Such charges shall be expressed in dollars and cents per Dedicated Transport line per month.

(b) The charges for any period ending on or before May 31, 1985, shall be computed by multiplying a hypothetical premium charge for each relevant access element by 4,050. The hypothetical premium charges shall be computed by dividing the annual revenue requirement for such element by the sum of the projected premium access minutes for an annual period ending on or before May 31, 1985, a number that is computed by multiplying the projected average number of Dedicated Transport lines that will be used in such period by 48,600, and a number that is computed by multiplying the projected non-premium access minutes for other services for such element for such period by .45.

(c) The charges for each element for any period beginning on or after June 1, 1985, shall be computed by multiplying the applicable charge for the preceding access period by the CPI factor. The CPI factor shall be computed by dividing the Consumer Price Index at the end of the preceding calendar year by the Consumer Price Index at the beginning of the preceding calendar year.

10. A new Section 69.207 is added to reads as follows:

69.207 Transitional Non-Premium Charges for Other Services.

Charges that are computed in accordance with this section shall be assessed upon interexchange carriers or other persons that receive access for services other than MTS-WATS equivalent services that is not deemed to be premium access in lieu of carrier charges that are computed in accordance with Sections 69.105-69.108 and 69.111-69.112. Such charges shall be expressed in dollars and cents per access minute. The charge for each relevant element shall be computed by dividing the applicable non-premium per line charge for MTS-WATS equivalent services by 9,000.

11. In Section 69.303, paragraph (c) is revised to read as follows:

69.303 Station Equipment.

* * * * *

(c) Investment in all other station equipment shall be apportioned between the Special Access and Common Line elements on the basis of the relative number of equivalent lines in use. Each interstate or foreign Special Access line shall be counted as one or more equivalent lines where channels are of higher than voice bandwidth, and the number of equivalent lines shall equal the number of voice capacity analog or digital channels to which the higher capacity is equivalent. Local exchange subscriber lines and WATS access lines shall be multiplied by the interstate separations factor for non traffic sensitive plant to determine the number of equivalent local exchange subscriber lines and the number of equivalent WATS access lines.

* * * * *

12. Section 69.304 is amended by revising paragraphs (a) and (b) to read as follow:

69.304 Customer OSP.

(a) Investment in local exchange subscriber lines and WATS access lines shall be assigned to the Common Line element.

(b) Investment in interstate and foreign private lines shall be assigned to the Special Access element.

* * * * *

13. Section 69.502 is revised to read as follows:

69.502 Base Factor Allocation.

In the period ending May 31, 1985, the projected revenues from the End User Common Line charges and Special Access surcharges shall be deducted from the base factor portion to determine the amount that is assigned to the Carrier Common Line element.

14. Section 69.503 is removed.

15. In Section 69.606, paragraph (b) is revised to read as follows:

69.606 Computation of average schedule company payments.

* * * * *

(b) AT&T shall submit a proposed 1984 formula to the Commission on or before June 30, 1983. The association shall submit a proposed revision of the formula for each annual period subsequent to May 31, 1985 or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before November 30 of the preceding year.

APPENDIX B

Parties filing petitions for further reconsideration or clarification include:

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Aeronautical Radio Inc. (ARINC)

American Communications, Ltd.

American Hospital Association

American Information Technologies Corporation (Ameritech)

Associated Press and Commodity News Services, Inc. (AP and CNS)

Association of Long Distance Telephone Companies (ALTEL)

Bell Atlantic Corporation (Bell Atlantic)

Bell South Corporation (Bell South)

Bunker Ramo-Eltra Corp. (Bunker Ramo)

Cincinnati Bell Telephone Company (Cincinnati Bell)

Combined Network, Inc. (Allnet)[1]

Eagle Telecommunications Inc. (ETI)

General Services Administration and Department of Defense on behalf of the Federal Executive Agencies (GSA)

GTE Corporation (GTE)

[1] Combined Network changed its name to Allnet Communication Service in November 1983.

GTE Mobilnet Incorporated (GTE Mobilnet)

International Business Machines Corporation (IBM)

International Communications Association (ICA)

Lexitel Corporation (Lexitel)

Massachusetts Department of Public Utilities (Massachusetts)

MCI Telecommunications Corporation (MCI)

National Cable Television Association, Inc. (NCTA)

City of New York

Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company (Northwestern Bell)

NYNEX Corporation (NYNEX)

Pacific Telephone and Telegraph Company (Pacific)

RCA Communications Inc. (RCA)

Satelco Incorporated, Teltec Saving Communications Co. and Tel Systems Corporation (Joint Resellers)

Satellite Business Systems (SBS)

Securities Industry Automation Corporation (SIAC)

Southwestern Bell Telephone Company (Southwestern)

Telesphere Network Inc. (TNI)

U.S. Telephone, Inc. (U.S. Tel)

United States Transmission Systems, Inc. (USTS)

Vermont Public Service Board (Vermont)

Parties commenting on these petitions include:

American Hotel and Motel Association

Central Committee on Telecommunications of American Petroleum Institute (API)

Electronic Data Systems Corporation (EDS)

GTE Service Corporation

U.S. Department of Justice

MCI

National Burglar Fire Alarm Association, Central Station Electrical Protection Association and Florida Ad Hoc Telecommunications Users Committee

National Telecommunications Information Administration (NTIA)

Reuters Limited

Telocator Network of America

Telecommunications Association of Minnesota

Utilities Telecommunications Council

Western Union

Parties filing opposition to the petitions include:

Ad Hoc Telecommunications Users Committee

American Telephone and Telegraph Company

Bell Operating Companies

Centel

North American Telephone Association

Rolm

United States Telephone Association

Parties filing replies in this proceeding include:

Ad Hoc Telecommunications Users Committee

Aeronautical Radio, Inc.

Allnet Communication Service

American Telephone and Telegraph Company

Associated Press and Commodity News Services Inc.

BellSouth Corporation

Bunker Ramo-Eltra Corporation

GTE Corporation

IBM

Lexitel Corporation

MCI

National Telecommunications Information Administration

City Of New York

Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company and Pacific Northwest Bell Telephone Company

NYNEX Corporation

Satellite Business Systems

Southwestern Bell Telephone Company

United States Transmission Systems, Inc.

Separate Statement of Mark S. Fowler

RE: 78-72

With this decision an important phase of the *MTS/WATS Market Structure* proceeding draws to a close. Major elements reconsider the pace and timing of the repricing of local access for interstate services. At the same time that we make the decision here to further study the effects on consumers of our access charges approach, I wish to strongly reaffirm that reform in this area is vital if universal service and an efficient telephone network are to be preserved and if fair competition is to be fostered through cost-based pricing of telephone service.

I view treatment of WATS access lines here as a temporary measure that will not change the present WATS discount structure. Dedicated WATS access lines resemble private lines, which do not use the local exchange loop plant jointly with local and intrastate toll services. Hence direct assignment of WATS access lines to interstate services, and their direct pricing for access purposes, appears to be the proper course.

For this reason, this decision endorses in principle the direct allocation of the costs of the closed-end of WATS as the most rational economic method of allocating costs. However, it recognizes a need for further study of the economic impact of such treatment and whether any other regulatory changes would be necessary to accommodate this change from historical usage sensitive treatment of WATS closed-ends.

Long term continuation of usage sensitive charging for WATS access lines would result in high volume subscriber drop-off and harm to universal service. Large users of toll services, such as WATS customers, are prime targets for uneconomic bypass. Usage based pricing of the dedicated WATS line has the potential to accelerate this already serious problem.

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

re: MTS and WATS MARKET STRUCTURE (Docket 78-72, Phase I)
and
INVESTIGATION OF ACCESS AND DIVESTITURE RELATED TARIFFS
(Docket 83-1145, Phase I)

The Commission's decisions in the above-captioned proceedings make many important modifications to the access charge plan and the access tariffs to ensure a workable transition to an equal-access world. One such modification is the new formula adopted for determining the relative cost of access for AT&T and its competitors. I am very pleased with the Commission's decision to revise this formula as it provides a sounder foundation for a competitive market than did our previous plans.

Throughout the Access Charge proceeding, I expressed my concerns for the competitive impact of the Commission's previous access charge plans.[1] These plans contemplated an enormous, immediate reduction in the differential between what AT&T and the Other Common Carriers (OCCs) paid for access. Such reductions would have had a severe financial

[1] *See* Concurring Statement of Commissioner Mimi Weyforth Dawson, re: MTS and WATS Market Structure, C.C. Docket No. 78-72, Phase I, FCC 83-356, released August 22, 1983, and Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure, Third Report and Order, C.C. Docket 78-72, Phase I, FCC 82-579, released February 28, 1983.

impact on the OCCs, threatening their viability as competitors in the interexchange market.

The Commission's new plan goes a long way towards ameliorating these adverse effects. It requires a differential in charges between equal and unequal access of 55%. When compared to the previous plan, which precipitously reduced the total differential to approximately 24%, this higher differential clearly aids in avoiding unnecessary rate shock and abrupt changes from the present ENFIA rates.

The Commission's new formula for computing OCC access charges reflects an important shift in the Commission's focus. Rather than attempting to determine the *value* of premium access at this time, the Commission has moved towards establishing a workable *transition* to an equal access environment; a transition that does not threaten the survival of interexchange competitors.[2] This shift in focus more appropriately reflects the Commission's earlier determination in the MTS and WATS Market Structure proceeding that competition in the MTS/WATS market is in the public interest.[3]

The differential, however, is only one component of the Commission's new formula for the computation of OCC access charges. In addition to paying a discounted rate for *unequal* access, the OCCs are required under the plan to pay the same rate as AT&T for *equal* access as it becomes available. I strongly support this aspect of the plan as a positive step toward cost-based rates for all competitors.

However, several important implementation questions need to be answered and refinements need to be made before the Commission's overall policy objectives in these two proceedings can be successfully met. First, the Commission must determine what is meant by "equal access." The Modified Final Judgment ("MFJ") adopts a "customer perception" standard.[4] While this standard may be appropriate from an antitrust

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[2] The Commission plans to institute a proceeding in 1985 "to determine whether a different procedure should be used to compute a non-premium charge. . . in subsequent access years." *Further Reconsideration Order* at para. 90. That would be the appropriate time to evaluate whether the concept of value is relevant to the calculation of non-premium charges. In this way, the Commission may be better able to analyze any advantages to AT&T or the OCCs in marketing their services given the significant percentage of end offices that may never convert to equal access.

[3] Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, MTS and WATS Market Structure, 81 FCC 2d 177 (1980).

[4] Specifically, the court accepted a definition of "equal access" as access whose "overall quality in a particular area is equal within a reasonable range which is applicable to all carriers." United States v. Western Electric, D.D.C. Civil Action No. 82-0192, Opinion filed July 8, 1983, pages 6-7. The adoption of this definition was based upon the Operating Companies' representations that "both voice and data customers will perceive no qualitative differences between AT&T's transmission and those of its competitors." *Id.* In adopting this "customer perception" test, the Court did not insist on identical technical

standpoint, it may or may not meet the mandates in the Communications Act of 1934, as amended.[5] Given the obviously critical importance of this question to a successful competitive environment, this Commission should move quickly towards investigating the details of "equal access" under the MFJ to determine how best to discharge its statutory obligations under the Act.

Another important implementation question, which I anticipate will require further refinement in the exchange carriers' access tariffs, is the end-office by end-office approach to eliminating the 55% differential in charges for unequal access. Under the access charge plan, the discount is eliminated for such Feature Group A connections as equal access becomes available in each end-office. The Commission's intention in adopting this mechanism was to ensure that the OCCs' total access charge expenses "more accurately reflect the access which a particular OCC receives" and "reflect the progress toward equal access at a particular time." *Further Reconsideration Order* at para. 78. Moreover, the end-office-by-end-office approach is clearly aimed at creating the incentive for an OCC to take premium access. While these are laudable goals, in theory, and ones which I strongly support, I anticipate that some refinement to the end-office approach may be required in order to successfully achieve them.

Such refinement may prove necessary given the technological limitations inherent in line-side connections. Because of these limitations, the exchange carrier is unable to determine from which end-office in a local calling area a call originates. Inasmuch as the removal of discounted charges is triggered by the conversion of any one end-office to equal access, the inability to determine a call's origination may prevent an exchange carrier from accurately charging for OCC premium and non-premium traffic.

This practical problem with the end-office by end-office approach can be illustrated by the following possible scenarios. If one of several end offices in a local calling area converts to equal access and the OCCs continue to originate line-side (Feature Group A) traffic from that office, the local exchange company cannot determine whether such traffic is originating from the converted end-office or one of the remaining non-

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quality. The Court made clear, however, that "the Department of Justice will be monitoring the quality of the access [the Operating Companies] will provide and that the price of falling short of their assurance of equal quality will be enforcement proceedings brought by the Department." *Id.* at 7.

[5] The FCC has plenary authority over carrier-to-carrier interconnection under Section 201(a) of the Act. Furthermore, Section 201(b) requires that offerings be reasonable, and Section 202(a) makes it unlawful for any carrier to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services. . . . or to make or give any undue or unreasonable preference or advantage to any particular person. . . ." See, 47 U.S.C. Sections 201-02.

converted offices. Thus, the exchange carrier may be unable to charge the premium Feature Group A rate for any of such traffic. Conversely, if the end office to which an OCC is directly connected is one of the first to be converted to equal access, the OCC may be forced to pay premium line-side rates for all its traffic even though much of it will be originating from unconverted end offices.

I do not believe that these scenarios reflect the Commission's intentions. If implemented without some refinement, the end-office by end-office approach may either remove any OCC incentive to order premium interconnections or unfairly require the OCCs to pay premium access rates for traffic originating from a non-premium access office. I would suggest that in their access tariffs, exchange carriers propose a billing methodology for premium and non-premium Feature Group A traffic aimed at avoiding these anomalous results. The Commission should closely scrutinize such proposals to ensure their consistency with Commission intent.

Another aspect of the Commission's revised access charge plan which merits discussion is the treatment accorded the open-end of FX private line service. The *Further Reconsideration Order* requires that the FX open-end access rate be computed at the same non-premium level as the OCCs'. *Further Reconsideration Order* at para. 97. I have maintained throughout the Access Charge proceeding that it is economically efficient for private line rates to recover only the directly attributable costs of this service and not the non-traffic sensitive local exchange costs not assigned to private line service.[6] Nevertheless, this modification to the payment level will result in less of a distortion in the pricing of private line services than a premium charge.

I remain concerned, however, with the different methods established in the *Further Reconsideration Order* for calculating the OCCs' and the FX users' access charge. The *Order* requires the OCC charge to be flat-rated and computed on the basis of an assumed average of 9,000 minutes per line. The FX open-end access charge, on the other hand, is to be computed at the non-premium rate but on a per-minute basis rather than on a per-line basis.

In my opinion, the reasons for these differing calculations are not convincing. While the *Order* correctly points out that low volume FX users "would be subjected to an unreasonable burden. . .if required to pay a per line charge," *Further Reconsideration Order* at para. 98, the same

[6] *See* Concurring Statement of Commissioner Mimi Weyforth Dawson, re: MTS and WATS Market Structure, C.C. Docket No. 78-72, Phase I, FCC 83-356, released August 22, 1983, and Separate Statement of Commissioner Mimi Weyforth Dawson re: MTS and WATS Market Structure, Third Report and Order, C.C. Docket 78-72, Phase I, FCC 82-579, released February 28, 1983.

can be said for those smaller OCCs and potential entrants whose per-line usage would not rise to the level of 9000 minutes. In effect, the minute cap operates as a potential barrier to new entry while at the same time accommodating the more mature entrants in the interexchange market. More importantly, these different rates may be unenforceable in the exchange carriers' access charge tariff unless the Commission is willing to move away from its policies prohibiting resale and shared use restrictions. Absent such restrictions, there would be no basis to prohibit an OCC from ordering FX service on a non-premium per-minute basis and reselling it to form an MTS/WATS equivalent service. However, permitting resale restrictions in the access tariffs would be inconsistent with general Commission policies favoring unlimited use of services and facilities. Indeed, in our *Access Tariff Investigation Order*, the Commission affirmed its policy that tariffs may not generally prohibit or restrict resale. *Access Tariff Investigation Order* at para. 69.

The *Further Reconsideration Order* also modifies the access charge rules relating to the closed-end of WATS. In our previous orders, WATS closed-ends were to be treated like dedicated private lines and assessed the Special Access line charge plus the surcharge. In the *Further Reconsideration Order*, the rules are modified to assess carrier common line charges to the closed-end of WATS. This change was made in light of the Commission's recent decision in the Joint Board proceeding to defer any modifications in the treatment of WATS access lines.[7]

I believe, in principle, that lines dedicated to interstate service, like WATS closed-end access lines, should be allocated and recovered on a directly assigned basis. This treatment more accurately reflects the dedicated cost of these lines. However, I support the Commission's decision to defer such treatment until the Joint Board reconsiders what changes, if any, to the Separations Manual are appropriate. Any recovery mechanism for interstate WATS costs should track the jurisdictional allocation of these costs under separations. By maintaining the *status quo*, the Commission will have further time to assess the competitive impact of recovering closed-end WATS costs in a manner consistent with direct assignment.

Moreover, this additional time will enable the Commission to assess the effect of direct assignment on rates under the current Interim Cost Allocation Manual ("ICAM"). Absent some adjustment to the ICAM, the direct assignment of closed-end WATS costs may result in significant cost

[7] Decision and Order, Amendment of Part 67, CC Docket No. 80-286, FCC 83-564, *released* February 15, 1984. In this proceeding, the Commission deferred any changes in the separations treatment of the closed-end of WATS pending further study by the Joint Board on the competitive impact of direct assignment. Order at para. 61.

and rate shifts between the MTS and WATS service categories leading to market disruption and customer dislocation.

The need for these sorts of adjustments to the ICAM, however, raises a more fundamental question with respect to cost manual regulation in general. The function of a cost allocation manual is to develop revenue requirements from which to produce lawful rates. If it becomes necessary to adjust the ICAM on a piecemeal basis when the rate structure that flows from its application is not in the public interest, the entire premise of cost manual regulation as a useful regulatory tool is brought into serious question. I have raised this general question on the value of cost-of-service regulation in a previous separate statement to the ICAM proceedings.[8] There I suggested the Commission entertain the possibility that cost manual regulation be replaced with a market rules approach *directly* constraining certain aspects of AT&T's dominant firm behavior. At the very least, however, the Commission should begin to address, specifically, what role a cost allocation manual should play in the new competitive and post-divestiture environment.

Finally, by the time the Commission again considers the direct assignment of WATS closed-ends, we hopefully will have finished our investigation into the WATS tariff.[9] A resolution of the rate and rate structure issues in that docket should provide clearer guidance for the appropriate action in the ICAM and Access Charge proceedings.

The Commission's latest decisions in the Access Charge and Access Tariff proceedings contain many adjustments and findings to accommodate valid public interest concerns. It would be unrealistic, however, to expect decisions on issues of such magnitude to be impervious to the need for refinement. Rather, in a rapidly changing telecommunications world, the Commission must retain its flexibility to deal with these very complex issues in an on-going manner. The Commission's latest decisions, however, are commendable milestones in that process.

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[8] *See* Separate Statement of Commissioner Mimi Weyforth Dawson re: American Telephone and Telegraph Co. Manual and Procedures for the Allocation of Costs, CC Docket No. 79-245, FCC 83-374, released August 22, 1983.

[9] American Telephone and Telegraph Co., 89 FCC2d 889 (1982) ("WATS Phase II"), clarified 91 FCC2d 339 (1982).

Common Carrier, Access Charges Distributions

Order Granting Waiver until June 1, 1985, adopted which waives § 69.604, which requires the National Exchange Carrier Association ("NECA") to bill and collect all carrier common line access charges. In addition, the order waives § 69.607(a), to the extent necessary, to permit the NECA to effect settlements on a net basis.
—*MTS/WATS Market Structure*
CC Docket No. 78-72

FCC 84-189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

In the Matter of	
MTS and WATS Market Structure	CC Docket No. 78-72 Phase I

ORDER GRANTING WAIVER

Adopted: April 30, 1984. Released: May 2, 1984

BY THE COMMISSION:

1. In its Access Charge Reconsideration Order, FCC 83-356, released August 22, 1983, the Commission adopted a final rule which provides that the National Exchange Carrier Association ("NECA") shall bill and collect all Carrier Common Line access charges."[1] In its earlier Third Report and Order in the Access Charge Proceeding,[2] the Commission had concluded that the NECA "shall compute a monthly net balance for each member telephone company that is not an average schedule company. If such a company has a negative net balance, the association shall disburse that amount to such company."[3]

2. On March 1, 1984, the NECA filed an emergency petition for a one year waiver of those sections of the Commission's rules. We then issued a Public Notice requesting comments and reply comments on or before March 9, 1984, and March 14, 1984, respectively. GTE Service Corporation, the Municipality of Anchorage d/b/a Anchorage Telephone Utility

[1] See Section 69.604 of the Commission's rules, 48 Fed. Reg. 43022 (September 21, 1983).
[2] 93 FCC 2d 241 (1983).
[3] See Section 69.607(a) of the Commission's rules, 48 Fed. Reg. 20366 (March 11, 1983).

("ATU"), the Rural Telephone Coalition ("RTC") and the United States Telephone Association ("USTA") filed comments in support of the NECA emergency petition. Subsequently, the Bell Atlantic Telephone Companies, the BellSouth Corporation and the Rural Electrification Administration ("REA") filed reply comments.[4] In addition, the Southwestern Bell Telephone Company filed a letter which supported the NECA request.

3. The petition was grounded upon difficulties which the NECA had encountered in attempting to finance working capital requirements. More specifically, the NECA stated that negotiations with potential creditors have revealed that the NECA would be required to receive long term exchange carrier assignments of revenues as conditions precedent to minimizing the NECA's costs of borrowing. In attempting to secure those assignments, the NECA was informed that many exchange carriers, including over 1,000 borrowers from the Rural Electrification Administration, have already assigned security interests in revenues to existing creditors. In addition, other exchange carrier indenture provisions require assessments to determine whether assignments of revenues will conflict with existing exchange carrier lending arrangements.

4. Under these circumstances, and in light of the time remaining until the effective date for access charges tariffs, the NECA has requested a one year waiver of Section 69.604(a) of the Commission's rules to afford the NECA sufficient time to resolve this matter, and permit exchange carriers, on a transitional basis, to bill, collect, and report carrier common line charges in a manner which would be "consistent with the past settlements model approach."[5] If the waiver were granted, the NECA has stated that settlements

> would be accomplished by calculating a net balance due each exchange carrier by deducting the exchange carrier's revenues from its share of total pooled revenues and causing those exchange carriers with a negative net balance to remit such net amounts to NECA and having NECA subsequently distribute these funds to those exchange carriers having a positive net balance. Funds would be collected by NECA from exchange carriers having a negative net balance no earlier than four (4) business days before the end of the month following the data month under report and then be distributed to exchange carriers having a positive net balance no later than the last business day of the month.[6]

5. The commenting parties agree with the NECA's assessment of the difficulties involved in attempting to implement the provisions of Section 69.604(a). The commenting parties emphasize the importance to exchange

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[4] The Bell Atlantic Telephone Companies' comments were filed on March 12, 1984, and therefore, will be treated as reply comments. REA filed a Motion to Accept Late-Filed Reply along with its reply comments on March 16, 1984.

[5] A collateral waiver of Section 69.607(a) was also requested to permit carriers to bill and collect revenues, with settlements among exchange carriers being made on a net basis during the period of the waiver.

[6] NECA Emergency Petition for Waiver at 10-11.

carriers of receiving a revenue stream from the NECA in a timely, stable manner and therefore urge the Commission to allow the waiver for the period sought. REA, RTC, and USTA noted that during the waiver period the NECA would have adequate time to develop a long term approach to exchange carriers' settlements.

6. We are aware of the complexities which are associated with effecting the lending arrangements which the NECA has described, and agree that additional time is required to permit the implementation of an efficient revenue distribution process. The period which has been requested for the waiver should be sufficient to resolve assignment of revenues questions and permit the NECA to arrange appropriate financing.

7. Accordingly, IT IS ORDERED that the request of the National Exchange Carriers Association for a waiver of Section 69.604(a) of the Commission's rules is granted.

8. IT IS FURTHER ORDERED that section 69.607(a) of the Commission's rules is waived, to the extent necessary, to accomplish the net settlements which are described in paragraph 4 of this Order.

9. IT IS FURTHER ORDERED that this Order shall be effective immediately, and that the waivers that are granted herein shall expire on June 1, 1985.

10. IT IS FURTHER ORDERED, That the Motion to Accept the late-filed reply by the Rural Electrification Administration is granted.

11. IT IS FURTHER ORDERED that this Order shall be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Competition, Common Carriers
Domestic Public Land Mobile Radio Service
Lottery
One-Way Communications
Paging Service

Commission finalized rules and policies for common carrier nationwide paging service. It adopted an open access policy for local carriers desiring to originate network pages. It preempted state regulation over rates of the network operators and decided to forbear from regulating rates of both network organizers and operators. Commission also decided to use a lottery to choose the three network organizers.
—*Nationwide Paging Service*
Gen. Docket No. 80-183

FCC 84-148

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In the Matter of	
Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service	Gen. Docket No. 80-183 RM-2365 RM-2750 RM3047 RM-3068

THIRD REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1984; Released: May 24, 1984

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING IN PART AND ISSUING A STATEMENT.

I. *PRELIMINARY STATEMENT*

1. In the *Memorandum Opinion and Order (Part 2)* in this proceeding, *Nationwide Paging Service (DPLMRS)*, 93 FCC 2d 908 (1983), the Commission adopted rules and policies governing the licensing and use of three frequencies that were allocated for common carriers to provide

nationwide network paging.[1] We adopted a two-step regulatory process in which one carrier ("network organizer") will be licensed on each network frequency with the responsibility for organizing the network,[2] and local common carriers ("network operators") will affiliate with one or more network organizers to provide page initiation and/or local distribution of network pages. We required network organizers to serve at least 15 markets initially and expand nationwide within two years. We also tentatively required open and nondiscriminatory access to the network channels for the network operators. However, recognizing that operational and economic realities might make the open access requirement impractical, we requested further comment on this issue. *Second Further Notice of Proposed Rulemaking*, 48 Fed. Reg. 21354, released May 4, 1983, *corrected*, 48 Fed. Reg. 24945 (1983) (*Further Notice*). In addition, because paging networks will be nationwide in scope and predominantly will transmit interstate messages, we preempted state regulation over technical standards, entry, and rate regulation for the network organizers. Since the record was not sufficient to determine the extent and method of rate regulation for the network operators, we solicited public comment on this issue in the *Further Notice*.[3]

2. Six parties filed comments in response to the *Further Notice* and seven parties filed reply comments.[4] All commenters favor open access for local carriers to initiate network pages. The commenting parties disagree, however, on whether it is necessary to require open access for traffic termination. With respect to the tariff issue, the commenters agree that end-user charges should not be tariffed, but disagree on the issue of whether or not the rates charged by the network organizer to originating carriers should be tariffed.[5]

3. We have carefully reviewed the comments filed in this proceeding and conclude that the public interest will best be served by modifying our

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[1] A network paging system would enable a subscriber to receive pages when traveling outside the service area. A network paging system can be divided into three different technical components—page initiation, network services, and local distribution. The network services would be furnished by the network organizers, with the remaining functions performed by the network operators.

[2] Network organizers would be the licensee of the frequency and would control the use of the frequency with all rights and responsibilities associated with such control.

[3] A more detailed history of this proceeding can be found in Nationwide Paging Service (DPLMRS), *supra*, at paras. 1-6.

[4] A list of the parties is contained in Appendix A.

[5] On August 11, 1983, the Commission received 16 applications from carriers desiring to be one of the three network organizers. Nine applicants propose using satellites to provide network paging, five carriers propose using terrestrial systems and two propose utilizing combined approaches. The pleading cycle for petitions filed in connection with these applications ended December 13, 1983. Consequently, these applications are now eligible for Commission actions.

tentative conclusion on open access requirements. Open access will be required for carriers desiring to originate network pages; however, we will eliminate the open access requirement for carriers providing local distribution of network pages. With respect to the tariff issue, we have decided to preempt state regulation over rate regulation of the network operators and forbear from regulating rates of both network organizers and operators. Finally, we have decided to award the network organizers' licenses by random selection.

II. *DISCUSSION*

A. *Network Access Requirements*

4. American Telephone and Telegraph Company (AT&T), MCI Airsignal, Inc. (MCI), and American Paging, Inc. (American Paging) support the view that open access should apply only to the originating arm of a network paging system, and not to the local distribution portion. They argue that allowing open access to originate network pages will promote competition. These commenters, however, oppose open access for traffic termination because it could result in uneconomic or inefficient duplicative facilities. They further argue that no beneficial purpose would be served by open access at the terminating end of network pages.

5. Page America Group, Inc. (Page America) and Mobile Communications Corporation of America (MCCA) support the option of requiring open access for both the originating and terminating portions of a network paging system.[6] They argue that "true open access" will ensure that more parties participate in nationwide paging, thereby reducing the potential dominance of the network organizers.

6. After carefully reviewing the record, we agree with the unanimous view of the commenters that the open and nondiscriminatory access requirement for traffic origination will best serve the public interest. By open and nondiscriminatory access, we mean that any qualified local carrier should be given the opportunity to affiliate with one or more network organizers on equal terms with other local carriers so that each local carrier will be able to offer the benefits of access to nationwide paging to its local subscribers. This open access requirement is similar in many ways to policies we have adopted in other contexts prohibiting any restrictions on resale of services, thereby making it possible for many entities to offer the underlying carrier's service to their own customers in competition with other entities.[7] Requiring open access to originate network pages will promote the public interest by ensuring that no local

[6] Millicom Information Services, Inc. (Millicom) advocates a modified open access approach to traffic termination. *See* para. 8, *infra*.

[7] *See, e.g.*, Cellular Communications Systems, 86 FCC 2d 469, 510-11 (1981); Resale and Shared Use (MTS-WATS), 83 FCC 2d 167 (1980); Resale and Shared Use (Private Line), 60

paging company is put at a competitive disadvantage because it cannot offer its customers network paging. As with the Commission's policies regarding resale of common carrier services, this policy will promote competition among originating carriers, thereby encouraging lower cost and more diverse services for consumers. Failure to require open access could have an adverse effect not only on competition in local paging, but also on a consumer's ability to obtain nationwide paging service from the carrier of its choice. By the same token, since there are little or no facilities involved in traffic origination, it is unlikely that open access for originating traffic will decrease the efficiency or add to the costs of operating a nationwide network or require duplicative facilities. Consequently, we will afford local carriers open and nondiscriminatory access to each nationwide network paging system to the extent that it is technically feasible.[8] Network organizers may require reasonable terms and conditions for originating pages over their systems within the framework of Section 201 and 202 of the Communications Act.

7. The comments diverge on the issue of whether an "open access" policy should be applied to the local distribution of network pages.[9] After evaluating the alternatives, we conclude that network organizers should be free to design their systems for local distribution without the requirement that they provide for the distribution of paging signals at the terminating end by multiple entities. An open access policy for traffic termination would necessitate a network organizer's granting all local operators the opportunity to distribute pages over the network frequency. Such a policy could deprive the network organizer of control over the number and placement of transmitters to be used in a market. Since traffic termination of network paging entails the construction and operation of 900 MHz transmitting facilities, which is a capital-intensive undertaking, it is likely that such an open access requirement would significantly add to the costs of operating a nationwide network, with no increase in transmitting capacity, and would increase the cost of this service to the user. *See* American Paging at p. 3; MCI at p. 13. This requirement could frustrate the establishment of efficiently configured

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FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F. 2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

[8] This does not mean that network organizers are not permitted to discontinue service to a local carrier for adequate cause. For example, a network organizer could discontinue service to an originating carrier who does not abide by the network organizer's technical specifications or who fails to pay for services. For local carriers aggrieved by any action by the network organizer, our complaint procedures under Section 208 of the Act remain available.

[9] The term "open access" is somewhat of a misnomer in this context, as what is involved is not access to the network for transmission of information, but rather the right to be incorporated into the network organizer's local distribution scheme.

systems of local base stations and may result in the uneconomic construction of duplicative facilities if many local carriers wish to provide network distribution facilities in the same area.[10] Open access may also introduce technical complications in distributing the network traffic.[11] Most important, it is not clear what public interest benefit will accrue from such a policy. Since the network organizers, rather than network operators, will design the system, route the traffic and charge for the call at the originating end, there will be no "competition" among network operators for traffic termination. If anything, there are likely to be endless disputes about "fair" distribution of terminating traffic and division of revenues. Overall, it appears that open access for traffic termination may increase the costs in producing network services without providing a commensurate public interest benefit. As a result, we will allow network organizers the discretion to perform the distribution function themselves or to contract with one or more local carriers for the local distribution of network pages. To implement this policy, we will accept "Stage II" license applications only from network operators who have specific, completed contractual arrangements with one or more of the successful network organizers. *See* para. 20, *infra.* [12]

8. We have considered Millicom's suggested approach to traffic termination and we decline to adopt its suggestion. In effect, Millicom proposes a variation on open access. All carriers who wish to build terminating facilities would be allowed to do so; however, if a paging subscriber requests that its pages be routed to a particular network operator that request would be granted. We reject this approach because it does not avoid the duplicative facilities or technical problems of open

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[10] Open access for call termination would have an adverse effect on spectral efficiency of systems and their capacity. If several distribution carriers shared the single frequency licensed for a network, a greater amount of transmission time would be devoted to "overhead signalling" transmissions than if there were only a single local carrier; this would lessen the amount of transmission time available for messages. It is also possible that spectrum inefficiencies may result due to the potential need for sequential paging transmission to avoid interference, thereby further lowering capacity and increasing congestion. When a licensing scheme for two-way land mobile radio entailing "perpetual open entry" for common carriers on a shared frequency block was before the court of appeals, the court questioned whether the open entry policy would serve the public interest when no additional capacity would be made available as a result of additional carriers' entry. Telocator Network of America v. FCC, 691 F. 2d 525, 549-50 (D.C. Cir. 1982). The circumstances here are analogous.

[11] Many commenters argue that open access would force network organizers to develop complex traffic allocation methods and expensive transmission coordination procedures, such as simulcasting or sequential transmission. *See* AT&T at p. 5; American Paging at p. 3; MCI at p. 11. *Cf.* United States v. American Tel. & Tel. Co., Civ. No. 82-0192 (D.D.C. December 7, 1983) (refusing to specify allocation method for undesignated traffic).

[12] Network organizers are free to adopt an open access termination policy as a business decision; however, open access for local distribution carriers will not be *required.*

access. In addition, it has not been demonstrated that consumers will know or want a particular carrier to distribute the local page in a remote city, especially in view of the fact that the types of service offerings will be dictated by the network organizers, not the carriers providing local distribution of network pages.

B. *Tariff Options*

9. The *Further Notice* presents the following five options for tariffing network paging:

> OPTION 1: Network organizers file FCC tariffs for end-to-end user charges. Revenues would be divided between the network organizers and local network operators pursuant to contractual arrangements.
>
> OPTION 2: Network organizers file FCC tariffs for end-to-end user charges. Charges for long haul traffic would be filed with the FCC. Charges assessed by the network operator to the end-user for local distribution of network pages could be filed at the FCC by the network organizer on behalf of the network operator, or at the state level by the local operator (and referenced in the FCC tariffs).
>
> OPTION 3: Network organizers file FCC tariffs for the interstate portion of long haul communications between its operating centers. States would regulate local access to the network as well as intrastate charges by network organizers.
>
> OPTION 4: Network organizers file FCC tariffs for carrier-to-carrier rates. Federal preemption of state tariff regulation and FCC forbearance from regulating end-user charges by the network operators.
>
> OPTION 5: Federal preemption of state tariff regulation and forbearance from regulating rates of both organizers and operators.

10. Page America, MCI, Telocator and Millicom support Option 4—federal regulation for carrier-to-carrier rates.[13] They argue that tariff regulation is necessary because it is premature to rely upon the emergence of effective competition to assure nondiscriminatory access, but they advocate imposing only minimal tariff requirements.[14]

11. AT&T, American Paging & MCCA support Option 5—complete preemption of state tariff regulation and FCC forbearance from the regulation of network paging rates. They argue that nationwide paging should be a highly competitive industry, predicting that each network organizer will face competition from the other two network paging systems, as well as from various other sources.[15] Consequently, they argue, marketplace forces, rather than regulation, can be relied upon to

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[13] None of the commenters advocates Options 1, 2, or 3. In fact, MCI objects to these options because they propose to tariff separately the long haul and traffic termination functions. It argues that bifurcated regulation would be awkward and may result in significant practical problems.

[14] Tariffs would be effective on short notice (14 days); validity of tariffs would be presumed; and extensive cost-supporting data would not be filed.

[15] For example, they predict competition from, *inter alia*, private paging systems and *de facto* paging networks on non-network common carrier paging frequencies.

set reasonable, affordable rates. National Association of Regulatory Utility Commissioners (NARUC), on the other hand, opposes Options 4 and 5. NARUC argues that the Commission lacks authority to preempt state authority over intrastate ratemaking.

12. Our authority to regulate the charges and services of interstate common carriers is contained in Title II of the Communications Act of 1934, as amended.[16] The courts have recognized a broad discretion in the Commission with respect to the manner in which it exercises its Title II powers to achieve statutory objectives.[17] This broad power to fashion rules appropriate to the problems confronted applies equally in the area of agency regulation of rates.[18] The *Competitive Carrier Rulemaking* was instituted to update our common carrier tariff requirements in light of the marketplace developments in telecommunications services.[19] In that proceeding, we explained that full regulatory scrutiny under Title II of firms lacking market power can impose costs on firms and consumers without offsetting benefits, and decided that we have the authority to forbear from full tariff and facilities regulation, where market forces help achieve regulatory objectives; as a result, we applied forbearance from tariff and facilities-authorization filings to several categories of firms lacking market power.[20]

13. Based on our review of the comments, we conclude that the public interest will best be served by our forbearing from regulating end-user charges.[21] We agree with the commenters that there are numerous alternatives to the network paging service under consideration. Many of

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[16] Sections 201-205 of the Act provide the basic statutory standards by which we judge the lawfulness of carriers' rates and service regulations. *See* Competitive Carrier Rulemaking, 77 FCC 2d 308, 312 (1979).

[17] *See, e.g.*, AT&T v. FCC, 572 F. 2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Computer and Communication Industry Association v. FCC, 693 F. 2d 198, 212 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983); Western Union Telegraph Co. v. FCC, 674 F. 2d 160, 165-66 (2d Cir. 1982).

[18] *See* FPC v. Texaco, Inc., 417 U.S. 380, 387-89 (1974); Aeronautical Radio, Inc. (ARINC) v. FCC, 642 F. 2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981); Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968) and the cases cited therein.

[19] First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); Third Report and Order, FCC 83-69, released March 21, 1983; Fourth Report and Order, FCC 83-481, released November 2, 1983.

[20] Market power can be defined as "the ability to raise prices by restricting output." One indication of a firm's market power that is often used is the level of its share of the relevant market. In addition, an analysis of the relevant market requires the consideration of close substitutes for the firm's product. *See generally* Fourth Report and Order, *Id.*, at paras. 6-13.

[21] The Competitive Carrier Rulemaking did not directly consider the Public Mobile Radio Services. As explained in the text, however, many of the principles underlying that rulemaking are relevant to our consideration of the best regulatory approach in this area.

these alternatives are virtually identical to network paging from the perspective of customers. For example, there are two frequencies allocated for multi-area private carrier paging systems. *Second Report and Order*, General Docket No. 80-183, 91 FCC 2d 1214 (1982), *modified*, 48 Fed. Reg. 56228, released November 23, 1983. Our records indicate that there are presently six licensees on these frequencies, which can be used to provide nationwide service. *See, e.g., Millicom Corporate Digital Communications, Inc.*, FCC 83-512, released November 23, 1983. In addition, regional and national *de facto* paging networks will be organized on the new 35 MHz, 900 MHz and FM subcarrier frequencies,[22] as well as on existing local paging frequencies.[23] *See Metromedia Telecommunications, Inc.*, FCC 84-24, released February 2, 1984. Thus, a network organizer will face competition for customers from not only the other two network organizers, but also from many other alternative network paging sources. In view of the existence of these sources of directly competing services, it is our judgment that network organizers will not be able to exercise market power with respect to the offering of intercity paging services to customers.[24] Other intercity telecommunications services may also provide close substitutes for network paging. Accordingly, we conclude that tariff regulation is not necessary to achieve our Title II objectives.

14. We have also examined the relationship between originating carriers and a network organizer to determine whether a carrier-to-carrier tariff is in the public interest. We find that the presence of alternative network services from the two other network organizers, as well as other long haul communication providers, will serve to limit the market power of network organizers. Essentially, network organizers are providers or resellers of intercity interexchange services which are very similar to the services subject to forbearance in the *Competitive Carrier Rulemaking*, *supra* note 19. Network organizers differ from other long haul providers to the extent that network organizers provide intercity communications service coupled with the right to use a common paging frequency. However, this difference is not significant because of the multitude of

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[22] First and Report and Order, BC Docket No. 82-536, FCC 83-154, released May 19. 1983, *modified*, FCC 84-187, released May 2, 1984.

[23] In addition, local paging services can serve the needs of some potential network paging customers. For example, executives frequently visiting another city on business may obtain local paging service in both cities, instead of network paging. While this may not be as convenient as network paging, there is clearly some substitutability of services.

[24] Our judgement in this case is grounded on our experience with the paging industry and the existence of many potential substitutes for network paging services.

paging frequencies available for *de facto* network paging systems.[25] Thus, carriers can request common frequency assignments in different geographic area and easily connect these facilities by long haul communications services, as an alternative to services from network organizers. We believe, therefore, that the existence of these many alternatives, coupled with an open access policy for traffic origination, will be sufficient to serve as a check against abuse of any market power that network organizers may possess. Further, the other provisions of Title II, including the obligation to charge just, reasonable and nondiscriminatory rates under Sections 201-202 of the Act and the Section 208 complaint process, apply to all network carriers. Finally, we reserve the right to require tariff filings at a later date, if our forbearance approach proves inadequate to foster competition and protect the public. *See Second Report and Order, supra* note 19, at paras. 21-24.

15. We are not persuaded by NARUC's arguments that the Commission cannot legally preempt state tariff regulation of the services provided by network operators.[26] Federal preemption may occur whenever the state action creates an obstacle to the implementation of the purpose of federal regulation. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141 (1982); *New York State Commission on Cable Television v. FCC*, 669 F. 2d 58, 62 (2d Cir. 1982) (*Orth-O-Vision*); *Digital Termination Systems*, 86 FCC 2d 360, 389-390 (1981). Our preemption of state rate regulation over the provision of network paging by network operators is based on several factors.[27] First, it is well established that the Commission has end-to-end jurisdiction over interstate communications services. *See Ambassador, Inc. v. FCC*, 325 U.S. 317 (1945). Nationwide network paging is an interstate service which, although divisible into three different technical components,[28] functions as an integrated communications system and, therefore, must be viewed as a whole for regulatory purposes. *See New York Telephone Co. v. FCC*, 631 F. 2d 1059 (2d Cir. 1980). Second, while NARUC correctly points out that network paging may involve intrastate communications in a few

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[25] In addition to the new FM subcarrier paging frequencies, there are 37 frequencies in the 900 MHz frequency band and 28 lowband paging channels (in addition to the eight original common carrier paging frequencies).

[26] In Nationwide Paging Service (DPLMRS), *supra*, at paras. 28-37, we preempted state authority over technical standards and entry regulation of both network organizers and operators and rate regulation of network organizers. This decision has been recently affirmed by the Court in National Association of Regulatory Utility Commissioners v. FCC, Case No. 83-1485 (D.C. Cir. filed January 17, 1984).

[27] We are not at this time addressing the question of state authority over local paging provided by network operators. The operators may not provide purely local services without special authorization. Nationwide Paging Service (DPLMRS), *supra*, at n. 8. The question of state jurisdiction is therefore premature.

[28] *See* note 1, *supra*.

instances,[29] the Commission may exercise jurisdiction over such communications when, as here, it proves to be technically and practically difficult to separate the intrastate from the interstate services.[30] *See California v. FCC*, 567 F. 2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978). Overall, state regulation of end-user charges would impede the rapid development of this new, nationwide communications service as well as increase the carriers' expense in providing this service. *See North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976); *North Carolina Utilities Commission v. FCC*, 552 F. 2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

16. Finally, we conclude that preemption of state regulation is valid, notwithstanding our decision to forbear from tariff regulation of this service. Even though we have declined to require tariff filings, it is clear that preemption can be accomplished by the affirmative, non-tariff regulatory provisions of Title II of the Act. *See Computer and Communications Industry Association v. FCC*, 693 F. 2d 198, 217 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) (*Computer II*); *Orth-O-Vision*, 669 F.2d at 66. *Cf. Hughes Air Corp. v. Public Utilities Commission of California*, 644 F. 2d 1334 (9th Cir. 1981) (Civil Aeronautics Board preemption of state regulation upheld, even for carriers that are exempted from CAB regulation). As we explained above, tariff regulation of the service disserves the public interest; we find, therefore, that allowing the states to regulate would militate against the public benefits of not requiring tariffs in this situation. *See Competitive Carrier Rulemaking, supra* note 19. Consequently, preemption of state regulation over the entire nationwide paging system is necessary to fulfill the national policy promoting the development and implementation of this new service.[31] *See Computer II*, 693 F. 2d at 214-15.[32]

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[29] For example, a nationwide system can be used to communicate intrastate from San Francisco to Los Angeles.

[30] For example, many network organizers propose to transmit network pages simultaneously nationwide or to multi-state regions of the country, charging one flat fee. It would be technically difficult and inefficient to require the organizer to separate the interstate pages from the intrastate one so that the operator could impose different charges accordingly.

[31] Reach, Inc. has filed a Petition for Clarification which questions whether preemption applies to the three 900 MHz frequencies reserved for network paging or to call network paging systems regardless of the frequencies used. We decline at this time to preempt state regulation of *de facto* network services on non-network frequencies. Such issues are beyond the scope of the instant proceeding. To the extent that nationwide service is established in the future by *de facto* network paging systems, we will entertain petitions for declaratory ruling on the preemption question.

[32] In view of the many public interest benefits of the preemption and forbearance option, we reject the other tariff options presented.

C. *Application and Authorization Procedures*

1. *Network Organizers*

17. In *Nationwide Paging Service (DPLMRS), supra,* at paras. 24-27, we outlined the application procedures for network paging. We indicated that there would be two phases in the licensing. First, applicants seeking to organize a network were required to submit a modified Form 401 application which included financial information, a description of the network design, and a description of the network service proposal. We also provided that if more than three applications were received and the applicants did not align themselves into three groups under the procedures in Section 22.29 of the rules, the three network organizers would be selected by whatever comparative selection process is in effect at the time. *Id.,* at para. 25. While we did not rule out using a lottery for choosing the organizers, we did not expect to use a lottery because we predicted that we would receive "disparate proposals." *Id.,* at n. 11.

18. At the time we adopted our nationwide paging policies, the Commission had not yet decided whether to use lotteries instead of comparative hearings to select licensees. Since that time, the Commission has adopted a lottery procedure to select among mutually exclusive applicants in the Public Mobile Radio Services (PMRS), as well as in certain other services. *Second Lottery Report and Order,* 48 Fed. Reg. 27182, released May 27, 1983, *recon. pending.* However, we deferred consideration of whether to use lotteries for nationwide paging until this proceeding. *Id.,* at n. 57.[33]

19. After carefully reviewing the informal comments and the 16 network paging applications currently on file, we conclude that utilizing a lottery to choose the three network organizers will significantly benefit the public interest. Contrary to our initial belief, the proposals submitted were no more disparate than other DPLMRS applications. While the technical means to provide network paging may differ from application to application,[34] we observe that each is proposing to provide the same basic service to the consumer and any differences among the applicants are not decisionally significant.[35] Further, each applicant is proposing to serve at

[33] We have received several informal comments from the applicants seeking to be network organizers, which addressed the lottery issue. These comments have been placed in the docket for this proceeding.

[34] A majority of the applicants propose utilizing a satellite network to provide network paging; the remaining applicants propose using terrestrial links or a combination of satellite and terrestrial links. We can find no reason to favor one type of network over another.

[35] For example, in addition to different networking proposals, the applicants propose different paging formats, service practices and maintenance plans. These differences have only a minimal effect on the public interest and, in any event, will likely to be set in

least the minimum number of cities initially and expand nationwide within two years. In short, these applications are no different than other DPLMRS applications. Accordingly, for the same reasons we decided to use lotteries for mutually exclusive DPLMRS applications, we also find that a lottery will serve the public interest in this instance. The minimal benefits to the public that might result from a comparative hearing are far outweighed by the costs and delay of service connected with the hearing process. As a result, the staff will conduct a lottery for network paging applications, pursuant to Sections 22.33 and 1.821 of the rules, in order to determine the three network organizers. A Public Notice announcing the date of this lottery will be issued in the near future. We will, of course, carefully review the qualifications of the three selectees and the merits of any petitions to deny filed against them before issuing operating authorizations.

2. *Network Operators*

20. The second stage in licensing network paging systems involves the local distribution carriers. In *Nationwide Paging Service (DPLMRS), supra,* at para. 27, we briefly described our *pro forma* licensing process for these "network operators," but we declined to accept any applications from prospective operators because our decision on access requirements would affect our licensing policies. *Id.*, at n. 17. In addition, we indicated that the licensing requirement was necessary only to ensure compliance with our technical rules for transmitter and antenna structures. In view of our elimination of the open access requirement for traffic termination, we have decided to modify our licensing procedures for network operators. Under our new access policy, network organizers have the discretion to select one or more carriers for the local distribution of network pages. *See* para. 7, *supra.* As a result, we will accept applications only from operators who have specific, completed contractual arrangements with one or more successful network organizers.[36] We contemplate issuing a Public Notice establishing the opening application date immediately after the grant of the network organizers' applications. There will be no cut-off date for these applications because there is no mutual exclusivity. Because under our new access policy the network organizers will now have complete control over the distribution of network pages over the local operator's facilities, we will consider applications for local distribution facilities to be minor applications not subject to public notice or

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practice by marketplace conditions. Additionally, we believe that the marketplace will ultimately dictate the coverage and charges for network paging.

[36] Applications of local distribution carriers may contain a letter indicating that the applicant has specific completed contracts with the network organizer, in lieu of submitting the contract itself. *See* Nationwide Paging Service (DPLMRS), *supra,* at para. 27, for other application requirements.

petitions to deny, *see* Section 22.27(c)(1) of the rules,[37] and both the network organizers and the local distribution carrier will be held responsible for the technical operation of such facilities.[38] We have decided to license network paging in this manner because the new access policy provides network organizers with greater control in the selection of local distribution carriers and the technical operation of the network paging facilities.[39] Consequently, we are modifying Section 22.527 of the rules to reflect this change of licensing procedures.

D. *Privacy and National Security Concerns*

21. As a final matter, we would like to express our concern about privacy of subscribers using alphanumeric paging equipment. Early paging systems conveyed no information other than the existence of a paging request. Current technology allows for much more sophisticated systems capable of sending alphanumeric messages up to 80 characters long, and similar systems are expected shortly to have the capacity to transmit considerably longer messages. This is clearly useful to many users of such systems. However, these systems are also vulnerable to interception by undesired third parties and the messages conveyed are easy to store and sort with computers. This can pose a threat to the privacy of subscribers. Large scale interception of commercial information can also pose a national security concern with respect to interception by foreign entities. While we do not have a record at this point on which to propose a specific action, we would like to point out to the operators of all sophisticated paging systems our concern in this area and encourage the operators to develop and offer optional encryption of message text for those users who wish to pay for this service.

III. *CONCLUSION*

22. This new nationwide paging service is being authorized pursuant to both Titles II and III of the Communications Act of 1934, as amended. We are adopting an open access requirement for traffic origination in order to promote competition among carriers, thereby encouraging lower cost and more diverse services for consumers. We are preempting state tariff regulation over the network operators and forbearing from regulating rates of both organizers and operators because we believe that

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[37] We are adding a note to Section 22.27(c)(1) of the rules to embody our interpretation that applications for local distribution facilities are minor applications.

[38] In the event the local distribution carrier subsequently requests authorization to provide local paging service over its facilities, its application will be subject to the public notice requirements.

[39] In Nationwide Paging Service (DPLMRS), *supra*, at paras. 18 and 24, we provided that the network organizer is the licensee of the frequency who controls the use of the frequencies with all rights and responsibilities associated with such control.

marketplace forces, in conjunction with our residual regulatory responsibilities, are sufficient to protect against discriminatory pricing. Finally, we have developed streamlined application processes in order to speed services to the public with a minimum amount of paperwork for the Commission and the applicants. In summary, we are confident that the policies adopted here will facilitate the implementation of this new, innovative interstate service in the most efficient and expeditious manner possible.

IV. *Regulatory Flexibility Act - Final Analysis*

23. *Need for and Purposes of Rules.* This action adopts an open access approach for traffic origination. It also adopts a forbearance approach for tariffing network paging services. The objectives are to provide competitive nationwide paging service to the public as expeditiously as possible.

24. *Issues Raised by the Public in Response to the Initial Analysis.* None

25. *Alternatives that would lessen impact.* We have considered alternative approaches to limited open access and to forbearance and conclude that the alternatives would be burdensome.

V. *Ordering Clauses*

26. Authority for this rulemaking is contained in Section 4(i) 201-209, 303(r) and 309(i) of the Communications Act of 1934, as amended [47 U.S.C. §§ 154(i), 201-209, 303(r) and 309(i)], and Section 553 of the Administrative Procedure Act [5 U.S.C. § 553].

27. Accordingly, IT IS ORDERED, that Part 22 of the rules IS AMENDED as specified in Appendix B. These amendments and the other policies adopted in this order will become effective 30 days after publication of this document in the Federal Register.

28. IT IS FURTHER ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

PARTIES FILING COMMENTS IN FURTHER NOTICE OF PROPOSED RULEMAKING
(900 MHz Network Paging)

American Paging Inc.

American Telephone and Telegraph Company

MCI Airsignal, Inc.

Mobile Communications Corporation of America

National Association of Regulatory Utility Commissioners

Page America Group Inc.

REPLY COMMENTERS

American Paging, Inc.

American Telephone and Telegraph Company

MCI Airsignal, Inc.

Millicom Information Services, Inc.

Mobile Communications Corporation of America

Page America Group, Inc.

Telocator Network of America

Appendix B

47 CFR Part 22 is revised as follows:

1. 47 C.F.R. § 22.27 is revised by adding a note after § 22.27(c)(1) to read as follows:

§ 22.27 Public notice period * * *

(c)(1) . . .

NOTE: Applications to provide local distribution facilities for network paging systems filed pursuant to § 22.527 are considered minor applications. * * *

2. 47 C.F.R. § 22.527 is revised by adding subsections (c) and (d) to read as follows:

§ 22.527 Channel assignment policies for 900 MHz one-way signaling channels reserved for stations engaged in providing network signaling service. * * *

(c) An applicant wishing to serve as a local distribution carrier must have specific, completed contracts with the network organizer(s) for which it is proposing to provide local distribution services. Applications may contain a letter indicating that the applicant has a completed contract with the organizer, in lieu of submitting the contract itself.

(d) Network organizers and local distribution carriers are jointly and severably liable for the technical operation of the local network distribution facilities.

Statement of FCC Commissioner James H. Quello Dissenting in Part

In re: *Third Report and Order* resolving certain issues with respect to *Nationwide Network Paging*, CC Docket No. 80-183.

Use of the lottery to resolve mutually exclusive applications in this new service is simply another manifestation of the Commission's propensity to

over-emphasize its new lottery authority.[1] A single hearing could resolve these cases in a reasonable time with the likelihood that the public would be better served.

The majority elects to use the lottery process because "[w]hile the technical means to provide network paging may differ from application to application, we observe that each is proposing to provide the same basic service to the consumer."[2] Of course, it's hard to imagine that any applicant would propose anything other than "the same basic service" since that is the service established by the Commission and for which spectrum was set aside. Thus presumably, anyone capable of reading the salient parts of our order is fully capable of implementing the service as efficiently and as effectively as anyone else. That kind of irrationality only heightens my concern that we may be doing serious harm to the comparative process.[3] Thus, I dissent to that portion of the Order which requires use of the lottery to decide among applicants.

I believe the majority was correct when it removed the open access requirement from the terminating end of these paging systems. Such a requirement could only serve to unnecessarily complicate system design without providing any significant public benefit.

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[1] See Report and Order Cellular Lottery Rulemaking, CC Docket No. 83-1096, FCC 84-150, ____ FCC 2d ____ (adopted April 11, 1984) (Quello, Commr., dissenting in part).

[2] See Third Report and Order Network Nationwide Paging, Gen. Docket No. 80-183, FCC 84-148, ____ FCC 2d ____, ____ (para. 18) (adopted April 11, 1984).

Interrogatories, Motion to Compel Answers to
Issue, Enlargement of, Denied
Issue, Enlargement of, Granted

Abuse of process issue denied where alleged threat or intimidation of licensee not established. Issue added to determine if principal violated policy against promoting use of illegal drugs. Discovery to develop evidence may be used. All parties are directed to answer interrogatories.

—*Phoenix Media Corp.*
MM Docket No. 84-36

FCC 84R-41

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PHOENIX MEDIA CORP.	MM Docket No. 84-36 File No. BPIH-821129AH
Barnes, London & Lockhart d/b/a LONG ISLAND RADIO	MM Docket No. 84-37 File No. BPIH-830223AA
ISLAND SOUND COMMUNICATIONS	MM Docket No. 84-38 File No. BPIH-830223AB
NASSAU BROADCASTING, INC.	MM Docket No. 84-39 File No. BPIH-830223AF
For Interim Authority to Operate the Facilities of Former Station WLIR(FM), Garden City, New York (92.7 MHz, Channel 223, 1 kW at 521 feet)	

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1984; Released: May 31, 1984

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL CONCURRING IN RESULT.

1. This is a special comparative proceeding to select an interim operator for the radio facilities of former Station WLIR-FM, Garden City, New York. A prehearing conference was held on March 8, 1984 by the Review Board, Tr. 1-26, and a briefing schedule has been established which remains in effect. See FCC 84R-32, released May 8, 1984.

2. In this document the Board will consider the petition to enlarge issues against Nassau Broadcasting, Inc. filed by Phoenix Media Corp., and three motions to compel answers to interrogatories filed by Phoenix and directed to the other applicants: Long Island Radio, Island Sound Communications, and Nassau Broadcasting, Inc. For the reasons discussed below the issues are enlarged:

> 1(a) To determine whether Robert A. Bottone, during his employment by Station WLIR as an announcer using the stage name "Bob Morgan", violated the Commission's policy against promoting or glorifying the use of illegal drugs, *see Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594 (D.C. Cir. 1973), and, if he did so, the effect of that misconduct on the basic and comparative qualifications of Nassau Broadcasting, Inc.

The motions to compel answers to interrogatories will be granted in their entirety; and, on its own motion, the Board will authorize further discovery pursuant to 47 CFR §§ 1.311 to 1.325 on the new issue 1(a). The applicants are directed to conduct that discovery in an expeditious fashion so that the products of discovery on Issue 1(a) will be available for submission with the Reply Briefs on June 22, 1984.

3. *New Issues.* The petition to enlarge filed March 7, 1984 by Phoenix requests two issues. The first issue concerns an alleged attempt by Paul W. Robinson, Jr., a 20% stockholder in Nassau, to retain his job at Station WLIR through the use of threats and intimidation after having been notified of his termination. Specifically, Phoenix asserts that Robinson, a former WLIR announcer and program director, was informed in October 1975 that he would be discharged for not performing his functions in a satisfactory manner and that Robinson reacted by "waving around an alleged copy of an operating log" which purportedly indicated that Elton Spitzer, the station manager, had ordered a WLIR employee to remain on the air in violation of the Commission's rules. Phoenix asserts that Robinson's actions were a "patent and obvious threat" to attempt to retain his job after being informed of his discharge and that threatening to use Commission processes in order to coerce licensee action is violative of Commission policy, *citing Patrick Henry*, 69 FCC 2d 1305 (1978); *James C. Sliger*, 70 FCC 2d 1565 (Rev. Bd. 1979); and *Home Services Broadcasting Corp.*, 24 FCC 2d 192 (Rev. Bd. 1970), in support. Phoenix also asserts that Robinson submitted supporting documents to the

Commission on this matter in 1976 during the pendency of Commission consideration of an application to assign the license of Station WKQW, Spring Valley, New York, to Rockland Media Corporation, in which Phoenix principals Spitzer and Samuel Berstein were stockholders. Phoenix attaches to its petition affidavits which were submitted to the Commission by Robinson and Spitzer in 1977 describing the incident in question.

4. In opposition, Nassau states that Robinson was program director at WLIR in October 1975 and was notified of his termination from that position as a result of his refusal to obey an order from Spitzer to operate the station in a manner that would violate the Commission's rules. Robinson did not use WLIR operating logs to threaten and intimidate, Nassau contends, but rather to demonstrate that Robinson was correct in disobeying Spitzer's order. As a result, Nassau claims, it was determined that Robinson has acted properly and he was permitted to remain at the station through October 1976. Phoenix also states that Robinson did not submit an affidavit to the Commission in 1976 to impede the WKQW transfer to Rockland Media but wrote it in March 1977 at the behest of the Commission's staff in connection with the Commission's investigation of WLIR at that time.

5. The Board will not add the requested issue because Phoenix has not made a *prima facie* showing that Robinson, while employed at WLIR in 1975, attempted or intended to threaten or intimidate station management in order to retain his employment or that his submission of an affidavit to the Commission in 1977 was an abuse of its processes. The incident underlying the requested issue, as described in the affidavits, involves a difference between Spitzer and Robinson over whether WLIR's transmitter was functioning properly on October 8, 1975 so that the station could remain on the air in accordance with Commission operating standards. Based only on his allegation that, at a subsequent meeting, Robinson "waved around" the operating log, Spitzer speculates that "it may well be" that Robinson was trying to intimidate him regarding the October episode, but provides no specific evidence of any actual threat made by Robinson. Robinson's response that he was simply attempting to justify his conduct on October 8 is not unreasonable or inherently incredible, nor do the circumstances described suggest coercive behavior on his part. Furthermore, we agree with Nassau that Robinson's affidavit, submitted to the Commission in connection with its 1977 investigation of WLIR, could have no bearing on the transfer application in which Phoenix principals were involved in 1976 and therefore lends no support to its allegations.

6. The cases cited by Phoenix are not applicable. *Henry* involved a licensee's alleged threat to file and actual filing of a civil damage suit

against a petitioner to deny; *Sliger* was concerned with counsel's threat to file an AM application on top of its opponent's renewal application if the latter did not withdraw its FM application, and *Home Services* involved a petitioner's deliberate withholding of information pertaining to its opponent's character qualifications during the pendency of settlement negotiations. Nothing in Phoenix's petition approaches the seriousness of the matters raised in these cases. Accordingly, we conclude that no issue involving threat or intimidation or abuse of Commission processes is warranted.

7. The second issue sought concerns Robert A. Bottone, a 40% owner of the Nassau interim applicant, who proposes to work full time as the program director and be "responsible for the station's entire program production and scheduling." Nassau Direct Exhs. 1 and 4. Phoenix alleges that Bottone was employed from February 1972 until November 1976 by WLIR as an announcer using the stage name "Bob Morgan." In October of 1976 Bottone participated in a broadcast class at the State University of New York at Stoneybrook which was tape recorded and "several times he admitted having used drugs while on the air." Pet. p. 8. A written transcript of the tape, which has been furnished by Phoenix, contains the following exchange:

> Student: Do you guys get high a lot on the air.
>
> * * * * *
>
> Morgan: We don't do it? Ya see, let me tell you the truth, now I'm not a [Bottone] spokesperson of WLIR (audience laughter.) The thing is we often get high right in front of the microphone. You know the mike (unintelligible).
>
> * * * * *
>
> Morgan: The foam around the mike smelled. But not anymore, we're pretty cool like that.
>
> * * * * *
>
> Morgan: We put on the live version of freebird and go out on the roof. (audience laughter) It's possible. Yes, sometimes it happens. Not really we don't get smashed on the air. There was a time when we were relaxed and together enough, uh to get totally out of our minds and do radio shows that were great, but we can't do that anymore. I don't know why . . . But I do know why (unintelligible). (Pet. p. 9.)

8. Phoenix also alleges that Bottone was discharged by WLIR in November of 1976 as a result of his on the air use of drugs. (Tr. 8, 11.) It points out that several years before this incident the Commission had expressed its serious concern that broadcast facilities could be used inadvertently to promote the use of illegal drugs, *citing Licensee Responsibility to Review Records*, 31 FCC 2d 377 (1971), *aff'd sub nom. Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973). There the Commission warned against the inadvertent

broadcast of material that promoted or glorified the use of illegal drugs. In essence, Phoenix argues that this case presents the question of whether an interim broadcast operation should be entrusted "to a former announcer who was discharged for drug use while on the air and who used his position at the station to propagate information of such drug usage to the public." Pet. p. 10.

9. Nassau generally denies the allegation of on the air drug use relying on the out of context statement: "Not really we don't get smashed on the air." It urges that there is "no evidence to support the inference that Mr. Bottone encouraged listeners drug use while on the air." Moreover, even assuming *arguendo* that Phoenix's allegations are true: "The Commission has long held that it will not investigate alleged criminal wrongdoing in its adjudicative hearing process where the civil tribunal with competent jurisdiction has not determined that the allegations have merit." Finally, it states that the facts concerning Bottone's discharge are in dispute because Bottone did not pursue labor arbitration to a conclusion; instead, he settled for $4,000. Opposition paras. 10-14.

10. We do not agree with Nassau that this case is controlled by the Commission's traditional reluctance to investigate criminal wrongdoing which has not been previously referred to the appropriate state or federal authorities. Recently in *Alan K. Levin*, FCC 84R-18, released March 15, 1984, we did indicate that the ALJ should have followed the Commission's traditional rule and not specified an issue concerning a former broadcaster's alleged violation of state and federal criminal drug laws. Significantly, in *Levin, supra*, the former broadcaster had operated the station for some four years but no question was raised about the station's past broadcast record during the period of his alleged drug use; nor was there an allegation of any violations of the Communications Act, the Commission's rules, or policies attributable to the alleged drug use. We contrasted that applicant's past broadcast record with the unfortunate record of disintegration and broadcast abuses in *Trustees of the University of Pennsylvania WXPN(FM)*, 69 FCC 2d 1394 (1979). Finally, in *Levin* there was no allegation that the applicant had violated the Commission's policy against promotion and glorification of illegal drugs which Phoenix invokes in this case.

11. Here the transcript of Bottone's braggadocio about the use of drugs while on the air, and his discharge by the station, even though "disputed," raise a reasonable inference that when he was "high right in front of the microphone" Bottone may have been insensitive to his obligation not to inadvertently promote or glorify the use of illegal drugs. We recognize that this incident occurred some eight years ago, and that Bottone's broadcast experience began when he was 15 and ½ years old in 1971 and has continued into the present. See Nassau Exh. 4. In adding a

refined version of the requested drug issue, we simply hold at this time that on the record before us Phoenix has made a sufficient showing so that it will be authorized to use the Commission's discovery processes to develop evidence to support its contention that the Commission's drug policy was violated by Bottone. The issue proposed by Phoenix has been refined to focus on the possible violation of Commission policy. The burden of proceeding with the production of evidence will be on Phoenix, and the ultimate burden of proof on Nassau. See 47 CFR § 1.254; *Kaye Broadcasting, Inc.*, 26 FCC 2d 459 (1970). After the completion of expedited discovery, para. 2 above, the Board will decide whether any substantial and material questions of fact remain which have to be referred to an administrative law judge for a trial type hearing. *See United States* v. *FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980); see also FCC Brief, in *Newark Radio Broadcasting Ass'n.* v. *FCC*, D.C. Cir. No. 83-2161, March 23, 1984, pp. 19-23.

12. *Discovery.* Prior to the prehearing conference, Phoenix on February 10, 1984, served written interrogatories on the other three applicants pursuant to 47 CFR §§ 1.311 and 1.323. One of the applicants sought a declaratory ruling from the Review Board that it did not have to respond to the interrogatories. At the prehearing conference on March 8, 1984 the Board pointed out that the use of interrogatories before the Review Board was specifically authorized by the Commission's rules, 47 CFR § 1.331(d), in this type of case. See also *Joseph Bahr*, 92 FCC 2d 114, 117 para. 6 (1982). Accordingly, the Board ruled that there was to be strict compliance with the requirements of the Commission's discovery rules, and afforded the applicants another 14 days to respond to the interrogatories. Tr. 6-7.

13. Our review of the three applicants' responses reveals that there has not been a serious attempt to respond to the interrogatories despite the clear applicability of the Commission's rules, the subsequent Board ruling, and the additional time for compliance. As Phoenix has shown, all of the interrogatories are relevant to the issues in this case; they call for specific factual information, but they are not oppressive. On the contrary, they request information which will either strengthen or impeach the comparative showings of the applicants. Submission of the information requested may also obviate the need for the Board or the Commission to request additional information because of gaps which later became apparent in the record. *See, e.g., Angeles Broadcasting Network*, FCC 84I-42, released April 16, 1984. Thus, we will grant in their entirety Phoenix's motions to compel answers to first set of interrogatories to Long Island Radio, Island Sound Communications, and Nassau Broadcasting, Inc. These interrogatories were first served more than three months ago and opening briefs are now due on June 8, 1984. We therefore direct that full and complete responses be hand delivered to Phoenix on or

before June 4, 1984. Phoenix may use the information either in its opening or reply briefs.

14. *Expedition.* All four applicants were represented by counsel at the prehearing conference at which, after a brief discussion, the Board indicated that it would strive to adopt a decision in this case within 180 days of the release of the designation order. Tr. 3-6. We will adhere to our briefing and oral argument schedule absent extraordinary or unusual public interest reasons justifying delay. We recognize that the failure to promptly and fully respond to written interrogatories, and to submit the proposed merger agreement within the 5 days specified by the Commission's rules, *see Biard Communications, Inc.*, 88 FCC 2d 381, 50 RR 2d 337 (Rev. Bd. 1981), has placed additional time pressures on the other parties to the case including this Board. We expect strict adherence to all general rules of practice, procedure, and special deadlines, and reserve the right to impose any appropriate sanctions for past or future violations.

15. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues against Nassau Broadcasting, Inc. filed by Phoenix Media Corp. on March 7, 1984, IS GRANTED to the extent indicated in paragraphs 2 and 11 above, and the following issue is added to this proceeding:

1(a) To determine whether Robert A. Bottone, during his employment by Station WLIR as an announcer using the stage name "Bob Morgan", violated the Commission's policy against promoting or glorifying the use of illegal drugs, *see Yale Broadcasting Co.* v. *FCC*, 478 F.2d 594 (D.C. Cir. 1973), and, if he did so, the effect of that misconduct on the basic and comparative qualifications of Nassau Broadcasting, Inc.

16. IT IS FURTHER ORDERED, That the motions to compel answers to first set of interrogatories directed to (1) Barnes, London & Lockhart d/b/a Long Island Radio, filed April 2, 1984, (2) Island Sound Communications, filed April 2, 1984, and (3) Nassau Broadcasting, Inc., filed March 9, 1984, ARE GRANTED IN THEIR ENTIRETY; and that the petition for declaratory relief filed February 21, 1984, by Island Sound Communications IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

Common Carrier, Cost Support Data, Adequacy of
Common Carrier, Costs, Allocation of
Common Carrier, Like Services
Common Carrier, Rate or Tariff, Unlawful
Common Carrier, Unbundling

Report and Order adopted guidelines and findings for private line rate structures and volume discount practices.
—*Private Line Rate/Volume Discounts*
CC Docket No. 79-246

FCC 84-147

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Private Line Rate Structure and Volume Discount Practices	CC Docket No. 79-246

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1984; Released: April 24, 1984

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER DAWSON ISSUING A SEPARATE STATEMENT.

I. *Introduction*

1. This proceeding was designed to promote effective regulation and increase opportunities for deregulation by restructuring private line tariffs. Notice of Inquiry and Proposed Rulemaking, 74 FCC 2d 226 (1979) (*Notice*). The *Notice* proposed five guidelines for tariffs to help us effectively determine whether terms and charges are just, reasonable, and nondiscriminatory.[1] We seek to avoid having two similarly-situated

[1] *See* 47 U.S.C. §§ 201-202; AT&T: Private Line Services, 61 FCC 2d 587 (1976), *recon.*, 64 FCC 2d 971 (1977), *further recon.*, 67 FCC 2d 1441 (1978), *aff'd in part sub nom.* Aeronautical Radio, Inc. v. Federal Communications Commission, 642 F.2d 1221 (D. C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). Without adequate justification, a carrier may not charge different rates or impose different terms and conditions for like (functionally equivalent) services. Western Union International, Inc. v. Federal Communications

customers who demand the same service from the same carrier (such as ten, full-time, voice-grade private lines between points A and B) charged different rates, i.e., unlawful discrimination. 47 U.S.C. § 202. Rate regulation is aided by the ability to make in-kind comparisons (comparing like rate elements in different tariffs). In addition, restructuring tariffs according to the proposed guidelines can help customers choose the most advantageous service options and facilitate competition. We adopt the proposed guidelines in this Order and further explain their application. The *Notice* also initiated an inquiry into volume-based rate discounts. We adopt findings and guidelines for volume discounts in this Order.

2. The *Notice* proposed the following guidelines: (1) rate structures for the same or comparable services should be integrated; (2) rate structures for the same or comparable services should be consistent with one another; (3) rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics, and a rate element which appears separately in one rate structure should appear separately in all other rate structures; (4) rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures; and (5) rate structures should be simple and easy to understand. Briefly stated, we seek to expedite tariff review and inhibit market segmentation (discrimination) by adopting a building-block approach to rate structures.

3. The *Notice* provided an extensive opportunity for interested parties to submit comments concerning our tentative conclusion, proposals, and questions.[2] We required American Telephone & Telegraph Co. (AT&T) to submit an outline of its proposal to restructure its private line offerings.

Commission, 568 F.2d 1012 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978); American Trucking Associations v. Federal Communications Commission, 377 F.2d 121 (D. C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

[2] 74 FCC at 256. In all, four rounds of direct, responsive, and reply comments, as well as proposals or counterproposals have been filed in this proceeding by parties representing a wide variety of interests, such as certificated communications carriers, user groups or associations, individual users, federal and state entities, and consulting firms. They include: Ad Hoc Telecommunications Users Committee; Aeronautical Radio, Inc.; Air Transport Association of America; American Broadcasting Company, Inc.; American Satellite Corporation; CBS, Inc.; Central Committee on Telecommunications Users of the American Petroleum Institute; Defense Communications Agency; Eastern Educational Television Network, Inc.; Economics and Technology, Inc.; General Services Administrations; GTE Telenet Communication Corp.; Independent Data Communications Manufacturers Association; MCI Telecommunications Corporation; National Broadcasting Company; Rolm Corporation; Satellite Business Systems; Securities Industry Automation Corporation; Society of Telecommunications Consultants; Southern Pacific Communications Company; the State of Hawaii; Trial Staff of the Common Carrier Bureau; Tymnet, Inc.; United States Transmission Systems, Inc.; and the Western Union Telegraph Company.

AT&T filed one proposal (Initial Proposal), and later replaced it with another proposal (Modified Proposal). These proposals, filed about four years ago and before the divestiture, are not identical to the interstate private line tariffs filed on October 3, 1983, by AT&T or the special access tariffs filed by exchange carriers in 1983 and 1984. Nevertheless, it appears that these carriers' currently-proposed private line rate schedules present issues substantially similar to those discussed in this proceeding.[3] Therefore, we use these proposals for solely illustrative applications of our guidelines.[4]

4. The Commission has lifted the tariff-filing requirement for many carriers and streamlined this requirement for some others.[5] In addition, we began an inquiry in 1983 examining, *inter alia*, possible reform of the tariff-filing requirements for AT&T.[6] Yet, analysis of some tariffs is a complex, lengthy, and costly process for the Commission, interconnecting carriers, other customers, and other competitors.[7] Compliance with these guidelines will increase consumers' welfare by decreasing the costs and delay involved in reviewing tariffs, increasing the Commission's ability to detect and control unlawful terms and charges, facilitating competition, and increasing customers' ability to select the most advantageous service options. Also, clear guidelines will help a carrier develop new offerings and change its rates with greater speed and certainty about the outcome of the Commission's review. The explanation of these guidelines does not attempt to anticipate every possible private line rate structure proposal. Nor is it desirable to constrain the Commission's discretion to apply these guidelines flexibility in light of the facts of a particular proposal. Still, this Order seeks to provide more guidance than we would in the course of reviewing a single tariff. We conclude that these guidelines will assist our review of AT&T's private line tariffs and the exchange carriers' special access tariffs. Our evaluation of competition may lead us to alter our application of these guidelines to one or more carriers in the future. AT&T may face more competition than exchange carriers for private line services, and competition may rise to the level that assures reasonable

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[3] *See* Investigation of Access and Divestiture Related Tariffs, FCC 83-470 (released October 19, 1983), FCC 84-51 (released February 17, 1984) (*ECA Tariff Order*); *See also* Letter to D. Culkin from Chief, Common Carrier Bureau, No. 61630 (January 9, 1984).

[4] We are reviewing AT&T's recent private line tariff filings in CC Docket 83-1145. *See* note 3 *supra.*

[5] Competitive Carrier Rulemaking, 48 Fed. Reg. 52452 (November 18, 1983) (Fourth Report).

[6] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, 48 Fed. Reg. 51340 (November 8, 1983). *See also* Amendment of Sections 1 and 61 of the Commission's Rules, FCC 83-402 (released October 5, 1983).

[7] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, FCC 83-470 (released October 19, 1983), *ECA Tariff Order. See also* Letter to D. Culkin from Chief, Common Carrier Bureau, No. 61630 (January 9, 1984).

rate structures and rate levels, making regulatory review unnecessary. For now, compliance with these guidelines should reduce a carrier's burden of cost justification and expedite our tariff review. But, the guidelines do not preclude a carrier, in a given case when a private line tariff does not comply with these guidelines, from justifying its departure from the guidelines and showing that its tariff is just, reasonable, and nondiscriminatory.

II. *Guidelines*

5. *Integrated Rate Structures.* In the *Notice*, we proposed that a carrier should use a single, integrated rate structure for the same or comparable services. AT&T had a number of different tariff provisions under which the same or comparable services were offered with different rates, rate structures, or terms and conditions. We noted that AT&T charged seven different rates, differing by a factor of more than ten, for nominal 4 kHz voice-grade channels of the same length.[8] Under the proposal, a carrier would have to employ a single rate structure for all its same or comparable services, such as voice-grade line services, and any surviving rate differentials would be shown within a common frame of reference. However, this guideline is neutral with regard to different forms of cost or rate averaging, provided that they are consistently applied and reasonable.[9] Where such rate differences can be justified on the basis of costs, competitive necessity, or other grounds, they can be reflected in a single, integrated rate structure. Furthermore, such a rate structure will help the Commission determine whether the rate differences are reasonable. We adopt this proposal.

6. We have had several opportunities to affirm our support for this guideline. For example, Western Union filed a new tariff stating that "the domestic Telex Service provided under this tariff is the same as the domestic Telex Service provided under Western Union Tariff No. 240

[8] 74 FCC 2d at 236, 260. "Same or comparable services" refers to all services (1) using similar transmission channels or with similar features, or (2) otherwise meeting similar customer demands, except where the carrier shows that the different transmission channels used and different features justify different rate structures. "Same or comparable services" may differ from the standard for "like" services under 47 U.S.C. § 202 and cases decided under that section. The intent of these guidelines is to avoid unnecessary differentiation of rate structures. We will clarify the definition of "same or comparable services" through application of these guidelines to specific tariffs.

[9] This proceeding does not address geographic deaveraging for private lines or switched services. Regarding private lines, the Commission will closely scrutinize the cost support and reasonableness of classifications for any proposed geographic deaveraging. Regarding switched services, the Commission will fully and carefully examine the policy implications of any proposed departure from the historic practice of geographic rate averaging. The record developed here does not allow us to make any findings on the lawfulness of geographic deaveraging in general or in particular forms.

except that the use of the service is limited to the transmission of inbound international Telex calls." By Common Carrier Bureau order, we rejected this tariff because it would have created two different schedules of rates, terms, and conditions for the same service.[10] Generally, different types of use and different customers of the same transmission service should be provided for by the same rates and terms, and under the same rate structure. It would be consistent with this guideline for rate structures to take into account a wide range of cost factors (such as different exchange access rates in different areas), provided that the rate differences are developed on reasonable subclassifications of service. Another example is that we directed AT&T to file a single group/supergroup rate schedule for all uses and customers of these channels.[11] When AT&T proposed to offer common carrier facilities exclusively as part of its satellite-based, end-to-end Series 9000 service, we ordered that AT&T make a single, general offering of these facilities available to customers of its other services, including high-speed Dataphone Digital Service (DDS) customers.[12] The rate and terms for use of a transmission service should not depend on whether that service is used in conjunction with another service or with particular customer-premises equipment. To remedy the problem of several different rates which could conceivably apply to physically-interstate tielines between PBX's located within the Washington Metropolitan Area, we urged AT&T to develop a comprehensive rate schedule which reasonably accommodates short-haul channels in a nondiscriminatory fashion.[13]

7. Our recent order on the Exchange Carrier Association (ECA) access tariff in CC Docket No. 83-1145, Phase I, criticized the failure to use an integrated rate structure in several provisions. For example, we rejected

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[10] Western Union Telegraph Co.: Interconnection of Telex and TWX Services for Other Common Carriers, Mimeo No. 2685 (released August 13, 1981). Similarly, we rejected tariffs that would separately classify and price many of the private line channels used by Other Common Carriers (OCCs) as opposed to non-OCC customers. The carrier did not demonstrate any significant functional distinction (service capabilities) in the different classifications of interexchange channels. AT&T: Rates for Certain Facilities Furnished to Other Common Carriers, 92 FCC 2d 896, 906-07 (1982). *See also* Alabama Elec. Cooperative, Inc. v. FERC, 684 F.2d 20, 27-28 (D.C. Cir. 1982) ("[C]harging the same price to two purchasers where the seller's costs with respect to each differ must . . . be considered discrimination, just as charging different prices where the seller's costs are the same."); *American Trucking, supra*, 377 F.2d at 128, 131.

[11] AT&T: Offer of Facilities to Other Common Carriers, 92 FCC 2d 46, *recon.*, FCC 83-550 (released December 12, 1983).

[12] AT&T: First Satellite-Based Private Data Service Offering, 89 FCC 2d 1116, 1122 (1982). *See also* AT&T: Picturephone (R) Meeting Service, 84 FCC 2d 322, 333 (1981) (claim that service offered under one tariff is "like" Series 7000 service offered under another tariff).

[13] U.S. Department of Defense, 75 FCC 2d 45, 51 (1979).

the proposed rate structure for Special Access. The proposal identified separate services and charges for specified uses, such as thirteen subclassifications of voice grade services, and a service for the transmission of speech or music.[14] When the same channel is employed to provide two customers similar services which are used for different purposes, charging different rates according to the type or purpose of use would be unlawful price discrimination. Customers should be permitted to use the services ordered in any manner which does not cause public harm. We required that all voice-grade (analog) facilities be priced under a single channel rate structure regardless of their use for voice, data, facsimile, or other type of transmission which can be accommodated over such channels. We imposed similar requirements for other basic channel types such as telegraph-grade channels and analog channels of greater than voice-grade bandwidth (broadband). Also, we rejected aspects of the Special Access proposal that would apply a different rate according to whether the customer is called an Interstate Customer or End User.[15] In some instances, the private line connection to an End User would cost almost ten times more than a similar connection to an Interstate Customer. No justification for the use of different rates for categories of users was given.

8. A recent Bureau order illustrates a benefit from integrated rate structures. ITT World Communications, Inc., filed tariff revisions for its international leased channels under which it would charge government users generally lower rates than commercial users.[16] The different rates were in a single integrated tariff obligating the carrier to provide the same service and service elements to both government and commercial customers. Our tariff review determined that the carrier failed to file cost support for this disparate treatment, and found that the tariff directly contradicted the carrier's claim that commercial customers – who allegedly require service elements which are not required by government customers but which in fact are provided to both under the tariff – are more costly to serve.

9. To explain this guideline further, we apply it to AT&T's two proposals in this proceeding. AT&T's Initial Proposal (pre-divestiture) involved two categories of private line tariffs. The Basic Private Line Channels tariff would offer fundamental private line components; customers could pick and choose piece-parts "off the shelf" to assemble their own facilities for services. Under the Augmented Private Line tariffs, AT&T would offer "high-feature," end-to-end services. As the comments pointed

[14] *ECA Tariff Order*, at 7-13, 7-28, 7-41, 7-54.

[15] *Id.* at 7-8, 7-9, 7-64.

[16] ITT World Communications, Inc.: Revisions to Tariff F.C.C. No. 43, Mimeo No. 476 (released October 28, 1983).

out,[17] the two sets of tariffs would employ different rate structures for the same private line channel functions. Yet, all voice channels have the same attributes and can be identified separately regardless of whether they are used as part of an end-to-end carrier offering or as part of a customer-created network. By this proposal, the same functional capability could be provided under different tariffs at different rates based on the way the services are named and packaged.[18] This practice violates the first guideline and would give the carrier the ability to discriminate among customers and cause customer confusion. As discussed in connection with the third guideline, packaging may be lawful when offerings of packages and building blocks employ consistent, comparable rate structures. In the context of such rate structures, we can determine the amount by which a package price differs from the sum of its component prices and whether the difference is cost justified or otherwise just, reasonable, and nondiscriminatory.

10. Also in AT&T's Initial Proposal was an intercity offering called Basic 24, for groups of 24 voice-grade channels where T-1 carrier systems for local distribution and a specified analog/digital interface were available. Basic 1 was to be available for single voice-grade channels. Basic 24 would have been priced less than 24 channels under the Basic 1 offering. AT&T argued that while Basic 24 may appear to be like Basic 1, cost differences exist which justify the rate differences; the bulk offering would use high-capacity carrier lines with supposedly lower average costs than the lines used for single channels. While these differences may exist in some cases, they appear to be solely the product of the definition of the offerings and their rate structures. Two customers could have used the same 24 voice-channel capacity over the same high-capacity system. If one interfaced with a T-1 system through a certain device and the other did not, they would have paid different rates for the same interexchange channels and similar end-to-end services. With two rate structures and restrictions on use (tying the 24 voice channels to T-1 systems and a specific interface for Basic 24), the carrier would segment its customers and charge different rates for like point-to-point private line services. The building-block approach of these guidelines is designed, in part, to end such customer segmentation and any resulting unlawful discrimination. If an innovation or particular interface configuration is cost saving, the

[17] *See* comments filed in March 1980 by Satellite Business Systems at 14-17, United States Transmission Systems at 3, Western Union Telegraph Co. at 28-31.

[18] For example, USTS claims that several of the rate elements in AT&T's Augmented Private Line Tariffs (Nodal Access Lines and Internodal Trunks) are identical to elements found in the basic service offering under different nomenclature (e.g., Local Distribution Sections, Interoffice Sections and channel supplements). USTS Comments, March 1980 at 6, 7 n. 22. *See also* Western Union Responsive Comments, March 1980 at 32-33.

carrier should make any rate decrease available to all similarly-situated customers who demand similar services, not just to those customers it chooses to allow to use the innovation or configuration. All of a carrier's voice-grade point-to-point private line services should be offered through an integrated rate structure, with rate differences such as for different features shown on the face of the tariff and the justifications for them given in a unified framework. (See Section III *infra* on possible justifications for private line volume discounts.)

11. AT&T's Modified Proposal in this proceeding (pre-divestiture) proposed to offer all interexchange and intraexchange voice-grade private lines under a single, integrated rate structure. This proposal complied with the first guideline to the extent that it resolves a major problem identified in the *Notice*, the existence of multiple different rate structures under which the same interexchange channels are offered. However, the proposed structural integration extended beyond the requirements of this guideline, with resulting problems. The *Notice* described interexchange and intraexchange private line channels as separate service classifications. Unlike most interexchange channels, many intraexchange channels do not utilize certain expensive multiplexing equipment and often employ metallic transmission facilities that are not carrierized. The proposed integrated rate structure and related cost allocations would impose unreasonable cost burdens on many intraexchange-channel customers. The facility distinctions are meaningful in that a carrier would seldom use an interexchange configuration to provide an intraexchange service, and cannot use an intraexchange configuration to provide an interexchange service. This is in contrast to the fungibility of many interexchange facility configurations used to provide a range of interexchange services. Also, despite the integration of some rate elements for intraexchange and interexchange channels, the effect of the proposed structure was to base mileage charges for intraexchange channels on physical disaggregation of the routing; in contrast, mileage charges for interexchange channels would have been priced on the basis of a hypothetical straight line between serving central offices, regardless of physical routing. (See discussion of this approach in paras. 19, 21 *infra.*) A preferable approach involves one rate structure for intraexchange private line channels and a separate rate structure for interexchange private line channels. while this problem is reduced for AT&T's tariffs post-divestiture, it persists in the special access tariffs of exchange carriers, *e.g.*, intraexchange lines versus intra-LATA, intercity lines.

12. *Consistent Rate Structures.* The second guideline we adopt from the *Notice* requires comparable rate structures for the same or comparable services. To the extent that rate averaging is employed, it should be used in a consistent fashion wherever similar service functions are

involved. Employing a new pricing technique for a new service to be used by certain customers without applying the same pricing technique to an existing, similar service or rate element used by other customers may constitute unlawful price discrimination. While a range of pricing techniques may be reasonable, the carrier should be consistent in applying any technique so that similarly-situated customers demanding similar services are charged according to similar rate structures. We noted that AT&T priced its intercity transmission channels on a mileage basis in its Series 1000, 2000, 3000, 4000, 5000 extension channels, and 8000 offerings, but that the mileage bands used in each offering differed. Furthermore, the TELPAK offering was priced on a flat rate per mile even though the same channels were involved.[19] While there may be cost differences across private line offerings which could justify different mileage bands and mileage-based rate gradations, the carrier should clearly explain the reasons for these aspects of its rate structure. Otherwise, the carrier should employ the same mileage bands and mileage-based gradations for its private line services. Another example described in the *Notice* is that AT&T priced local distribution channels at a flat rate in most private line tariffs, but on a mileage basis in the proposed BSOC 6 tariff.[20] Also, the BSOC 6 tariff used airline mileage between "wire centers," not airline mileage between points served as in many other AT&T tariffs.[21] The use of different pricing techniques for comparable services without adequate justification would violate this guideline.

13. Several decisions demonstrate our support for this guideline. We focused on two aspects of inconsistent rate structures in AT&T's Basic Packet Switching Service (BPSS) offering.[22] While AT&T proposed a twelve-month notice provision for terminating BPSS, it imposed no similar tariff provisions for other private line services such as Series 2000, Series 3000 and CCSA, and imposed a three-month period in its Terrestrial Digital Circuits tariff offering. As in mileage bands, notice periods for terminations should be uniform unless the justifications for differences are clearly explained. Also, the Commission was concerned about potential imbalances in rates between DDS connections to BPSS and DDS connections to packet switches located on customer premises. We stated that these inconsistencies seemed to be designed to advantage certain customers and to impair competition. As explained in the first guideline, the rates and terms for use of a transmission service should not depend on

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[19] *Notice*, 74 FCC 2d at 238, 259.

[20] Bell System Operating Company Tariff F.C.C. No. 6 (BSOC 6) was filed in 1979, and was intended to consolidate all OCC facility offerings into a single tariff. *Id.* at 234. It was subsequently withdrawn.

[21] *Id.* at 238.

[22] 91 FCC 2d 1, 16-17 (1982), FCC 83-221, at 16-19 (released May 26, 1983).

the type of use or customer, whether it is used in conjunction with another service, or whether it is used in conjunction with particular customer-premises equipment. Similarly, we objected to tariffs charging Other Common Carriers (OCCs) different rates for interexchange, jurisdictionally-interstate channels depending on whether the channels extend between points within a single state or points in different states.[23] Twice the Commission expressed concerns about discrimination through different rate structures for 1.544 Mbps channels limited to certain services.[24] A remedy is to price these channels consistently regardless of the type of use or customer. Services can be developed using the building block for this transmission channel and, perhaps, building blocks for other transmission channels or functions. Another illustration is the MPL order.[25] We stated that we needed to look into the carrier's inconsistent application of rate deaveraging concepts, in this instance based on facility density, to its like or comparable services.

14. A benefit of consistent rate structures can be seen in our review of AT&T's DDS tariff in 1977.[26] The carrier proposed a rate structure for a four-speed service offering, with the charges for various rate elements increasing with the service speed. Aided by the consistent rate structure, we compared the charges for rate elements associated with different speeds and saw the lack of cost support for the disparities in charges. The carrier alleged that charges for 2.4 kbps rate elements were set at levels close to the estimated corresponding costs, and charges for the rate elements of higher speeds were selected primarily to maintain a reasonable progression of rates with increasing speed. In light of the absence of cost support for these rate differentials, we concluded that the rate differences were unsubstantiated and unlawful.

15. AT&T's Initial Proposal in this proceeding, with two categories of private line tariffs and rate structures, did not achieve consistency and internal rate structure comparability. The Basic Private Line Channels tariffs were built on three rate elements: Local Distribution Sections (LDS) between a customer's premises and a telephone company's Serving Wire Centers (SWC); Interoffice Sections (IOS) between two SWCs; and Channel Supplements, including conditioning, echo control, and other features which improve channel quality or utility. The LDS was priced on a flat, distance insensitive basis, while the IOS was priced based on the airline miles between SWCs. Under the Augmented Services tariff, the

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[23] AT&T: Rates for Certain Facilities Furnished to Other Common Carriers, 92 FCC 2d 896, 906-07 (1982).

[24] AT&T: First Satellite-Based Private Data Service Offering, *supra*; AT&T: Picturephone (R) Meeting Service, 89 FCC 2d 1017 (1982). *See also* AT&T: International Video Teleconferencing Service, Mimeo No. 433 (released October 27, 1983).

[25] AT&T: MPL, 74 FCC 2d 1, 46 (1979).

[26] AT&T: Dataphone Digital Service, 62 FCC 2d 744, 792 (1977).

customer would be charged for Nodal Access Lines (NALs); each NAL is a two-point transmission path between the customer location and a telephone company Node, possibly including the functional equivalents of an LDS, an IOS, and Channel Supplements. The Augmented Services tariff also proposed the Internodal Trunk (INT) rate element, defined as a two-point transmission path between telephone company Nodes; an INT consisted of one or more IOSs and Channel Supplements. The NAL rate element was priced on a non-distance-sensitive basis while the INT was priced on a distance-sensitive basis. The overlap between rate elements for Basic and Augmented Services resulted in substantially different pricing treatment for the same service functions. For example, the Augmented Services tariff priced the functional equivalent of an IOS in some cases on a non-distance sensitive basis (as part of a NAL) and in other cases on a distance-sensitive basis (as part of an INT).[27] AT&T did not justify using inconsistent pricing techniques, and the Commission lacked sufficient information to determine the reasonableness of charges derived from inconsistent pricing techniques. Where the same service functions are covered by different rate elements and rate structures in different tariffs, in-kind comparisons become difficult, if not impossible, to perform.[28] When a carrier employs consistent rate structures, the Commission can determine that charges are reasonable and nondiscriminatory with less analysis of costs and fewer comparisons of charges for similar services.

16. AT&T's Modified Proposal combined three rate elements for all private line channels–LDS, IOS, and Service Functions. Despite the apparent simplicity of this single rate structure, a major rate structure inconsistency is evident with regard to intraexchange channels. The LDS element is priced on a flat rate basis while the IOS element is priced based on the airline miles between SWCs. The distance from the customer's locations to the originating and terminating SWCs does not affect the LDS charges. But, the selection of SWCs determines the distance between them, which in turn affects the IOS charges, regardless of the physical routing of the line between them. Total charges are affected by the distance between SWCs, but not by the distance between a customer's locations and the SWCs to which they are connected. This inconsistency can foster discrimination, particularly when the carrier can exercise discretion in the location and choice of SWCs for customers. AT&T did not justify this rate structure or the pricing inconsistencies it caused. A more consistent rate structure would price all point-to-point intraexchange

[27] AT&T Initial Proposal 65-66.

[28] *See* comments filed in March 1980 by Independent Data Communications Manufacturer's Association, Ad Hoc Telecommunications Users Committee, Western Union Telegraph Co., MCI Telecommunications Corp., Satellite Business Systems.

private line channels (e.g., channels for less than a certain distance between customer-designated points or between the rate centers for those points) on a flat-rate basis or all on an airline-mileage basis between customer-designated points. We recently ordered that the ECA's proposed provisions for intraexchange Special Access be restructured under the tariff as a single channel, priced on the basis of either distance between customer-designated points or flat rates.[29] Intercity channels between customer-designated points could, for example, be priced on the basis of charges for intraexchange distribution channels plus charges for airline mileage between rate centers for the cities.

17. *Selection of Rate Elements.* The third guideline in the *Notice* and adopted here requires carriers to select rate elements to reflect market demand for components or packages thereof, pricing convenience for the carrier and customers, and cost characteristics. Also, a rate element which appears separately in one rate structure should appear separately in all other rate structures. Compliance with this guideline facilitates comparison of rate elements, helps consumers make intelligent choices among available offerings, and enables competitors to obtain the facilities they demand for interconnection and resale. We recognize that packaging may increase the efficiency with which a carrier provides services, the ease with which a customer obtains services, and customers' satisfaction with services. Yet, in many cases, carriers unnecessarily "bundled" service functions together under one rate element, thus effectively denying customers the option of, or penalizing them for, using less than all the service functions under that element. The *Notice* cited several examples of such bundling.[30] We also objected to unnecessarily "splintered" rate elements, whereby an excessive number of rate elements add confusion and complexity to the rate structure. For example, the BSOC 6 tariff involved four different rate elements to represent a point-to-point intracity private line circuit in lieu of the single rate element employed in other tariffs.[31]

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[29] *ECA Tariff Order*, at 7-12.

[30] *Notice*, 74 FCC 2d at 245. Examples include combining the access line and switch access charge in Enhanced Private Switched Communications Services (EPSCS); limiting rates for access lines in a tariff only to customers of Common Control Switching Arrangements (CCSA) Service, or rates for TELPAK extension channels only to TELPAK base capacity customers; combining conditioning with the interexchange channel rate element under Series 4000; and combining the channel terminal with the station terminal under Series 2000 and 3000.

[31] *Id.* at 245 n.42. Antitrust courts have struggled with the delineation of products in the context of tying (bundling) cases. *See, e.g.*, Jefferson Parish Hospital District No. 2 vs. Hyde, 52 U.S.L.W. 4385, 4390-91, 4395 (concurring opinion of O'Connor, J.; "For products to be treated as distinct, the tied product must, at a minimum, be one that some customers might wish to purchase separately *without also purchasing the tying product.*") (March 27, 1984).

18. We have often employed the concepts of this guideline in reviewing tariffs. Five examples will be given. In 1980 we stated our concern over private line tariff provisions which could be a vehicle for discriminating against customers who provide their own equipment, such as imposition of a separate maintenance charge where customer-provided equipment is at fault but not where there is faulty carrier-provided customer premises equipment.[32] This pricing practice would lessen competition in providing customer premises equipment. A separate maintenance charge, if applied, should be an unbundled rate element applicable to all customers. Next, we expressed our concern when AT&T proposed to offer wide-band, terrestrial T-1 carrier links exclusively as part of its satellite-based, end-to-end Series 9000 service. Other potential customers were interested in using these terrestrial facilities but not the end-to-end service. We urged the carrier to make a discrete, cost-based, general offering of the terrestrial transmission facilities.[33] Similarly, we required AT&T to make available earth stations and the space segment for its Satellite Television Service as separate rate elements.[34] Fourth, the Commission recently ordered AT&T to file tariff revisions which unbundled "all [channel service units], CSU-like devices, and digital [network channel terminating equipment] so that any rates and charges associated with these devices, when provided by AT&T, are stated as separate rate elements."[35] By this action, we sought to promote competition in providing CSU and limit cross-subsidies from transmission services. Fifth, we found fault with AT&T's Picturephone Meeting Service tariff for establishing a separate classification for 1.544 Mbps channels when used with particular terminal equipment. This practice would "obscure the fungible nature of these channels and inhibit their use in non-PMS applications by fashioning a separate tariff classification containing terms and conditions which are earmarked for and preferential of PMS use."[36]

19. Our recent order in CC Docket No. 83-1145 criticized the ECA for unbundling selected cost elements which are generally not separately

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[32] AT&T: Maintenance of Service Charge Associated with Private Line Service and Dataphone Digital Service, 82 FCC 2d 370, 372-73 (1980).

[33] AT&T: First Satellite-Based Private Data Service Offering, *supra*.

[34] AT&T: Series 7008, 87 FCC 2d 889 (1981). *See also* AT&T: International Video Teleconferencing Service, Mimeo No. 433 (released October 27, 1983).

[35] Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, FCC 83-268, at para. 45 (released June 14, 1983), Mimeo No. 1644 (released January 5, 1984). *See also* AT&T: Equalization Filing, 89 FCC 2d 1000, 1005 (1982) (unbundling operator assistance portion of MTS tariff); AT&T: Offer of Facilities to Other Common Carriers, *supra*, at 7 (requiring unbundling of modems and special conditioning from interexchange channel rates for wideband and other services since these elements are stated separately for some other services).

[36] AT&T: Picturephone Meeting Service, *supra*, 89 FCC 2d at 1022-23.

useful to customers, rather than unbundling service functions which might be separately useful.[37] The proposed Special Access rate structure appeared to simulate physical routing. An end user ordering a private line between two points would order two channels to exchange carriers' wire centers (one for each point, called Special Access Lines), possibly channels interconnecting those wire centers with wire centers serving the customer's interexchange carrier (called Special Transport), and channels interconnecting the interexchange carrier with its serving wire centers (called Access Connections). Significant distortions between the actual service ordered and the applicable charge would emerge from the selective unbundling of underlying physical elements rather than the unbundling of service attributes intended by this guideline. A customer ordering a channel to interconnect two of its own premises only a hundred yards apart could pay far more than a customer interconnecting two points several miles apart but served by the same wire center. Typically, the carrier has substantial discretion in locating or designating a customer's serving wire center, leading to possible discrimination when large differences in a customer's charges are caused by such choices. Also, designating physical elements by type of use (for interconnection to an End User or Interstate Customer) caused substantial rate differences for the same service function. Moreover, no justification was provided for singling out physical routing as the principal, if not sole, cost variable governing the Special Access rate structure. Unbundling based on actual cost characteristics may promote efficient use of telecommunications facilities, 47 U.S.C. § 151, and be required to prevent discrimination, 47 U.S.C. § 202; *Alabama Elec. Cooperative, supra.* Actual channel routing often does not follow the configuration model underlying this rate structure. All costs, including for billing, marketing, and administration, were treated as though they varied with the length of physical routing. The separate rate elements selected were not generally useful to customers, and were therefore an unnecessary source of complexity. There would be substantial difficulty in interpreting what rates apply in certain situations, possibly leading to carriers' discretionary application of different rates to different customers for the same service. We found this unbundling based on physical routing unlawful, and required pricing of intraexchange point-to-point private line channels on the basis of airline distance between customer-designated points or flat rates.

20. In AT&T's Initial Proposal, the Basic 24 offering bundled T-1 digital carrier systems for local distribution channels together with groups of 24 ordinary voice channels over high-capacity, long-haul

[37] *ECA Tariff Order*, at 7-1 to 7-13, 7-15. *See also id.* at 7-28, 7-54 (unlawful bundling of basic transmission service with other features, use limitations, customer designations, or interface devices).

systems and with interface devices. *See* para. 10 *supra.* As described above, T-1 systems have many potential uses on a stand-alone basis, but would be offered only as a component in the Basic 24 package. This bundling violates the third guideline; customers would benefit from a general offering of T-1 systems, with the carrier free to incorporate those systems in other offerings as well. The availability of, or rates for, such a transmission channel should not depend on the type of use or customer, on taking other transmission channels as well, or on taking customer premises equipment as well. The same analysis applies to the proposed Augmented Private Line Services tariffs. While carriers should be able to market packages of channels and services,[38] there should be general basic building blocks available to meet market demands. Furthermore, the offerings of packages and building blocks should use consistent, comparable rate structures.

21. Both splintering and excessive bundling also existed in AT&T's Modified Proposal. The disaggregated rate structure based on physical routing created splintering, similar to that discussed in connection with the ECA tariff (para. 19 *supra*). In addition, unnecessary bundling existed in this rate structure since there was no separate rate element for the connecting link between a SWC and a toll center. While this rate element would not be demanded by an end-to-end AT&T customer, it would be demanded by OCCs.[39] The proposal does not allow us to compare the rates or costs applicable to such a connection by an end-to-end AT&T customer with those which would be associated with an OCC's use of the same connection. The absence of a rate element here may lead to overcharging OCCs. The choice of rate elements and selective disaggregation of costs causes discrimination favoring AT&T. The customer's demand for private line channels is characterized by a communications path between customer-designated points. This rate structure and the Special Access proposal in the ECA tariff would instead require the customer to order channels to wire centers. This type of complex rate structure does not serve market demand or carriers' pricing convenience. Nor does it accurately represent all cost characteristics. Except where it is practical to list all cost elements for a service, tariff rate elements must be based on well-defined service elements (e.g., a transmission path or message transmission between customer-designated points) priced to cover the average cost of providing those service elements. Costs should be recovered in accord with demand

[38] *See* para. 9, *supra. See also* AT&T: Picturephone (R) Meeting Service, *supra*, 89 FCC 2d at 1025; comments of the Security Industry Association Corp., Aeronautical Radio, Inc. and Air Transport Association of America; United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 612 n. 1 (1977); *Hyde, supra.*

[39] *See* Further Responsive Comments filed in June 1980 by Western Union Telegraph Co. at 16-20. *See also* June, 1980 comments by Satellite Business Systems, American Satellite Corp., MCI Telecommunications Corp., Southern Pacific Communications Co.

for actual service elements rather than by selected disaggregation of cost elements.

22. Another type of problem regarding selection of rate elements appeared in AT&T's Modified Proposal. The guidelines seek to prevent a carrier from charging different rates for similar uses of the same transmission channel by similarly-situated customers. Allowing a carrier to employ non-integrated or inconsistent rate structures impedes regulatory achievement of this goal, as explained in connection with Guidelines One and Two. Carriers can also attempt to charge different rates for similar services employing the same channel by bundling the channel with certain modems, data sets, multiplexers, or other terminal equipment. With this bundling, the carrier can disguise the identity of a channel and charge different rates under different rate structures for similar services. In addition, offerings under the Modified Proposal would designate channels on the basis of throughput capacity (e.g., a 48 kHz private line which may be provided via a group, supergroup, mastergroup, or some other type of channel) rather than facility types. The throughput capacity of many types of channels depends on the attached terminal equipment. Throughput designations can be used to mask the underlying nature of the channel and charge discriminatory prices for similar uses of the channel. Also, this practice can be used to reserve certain facility types for a carrier's preferred users and uses. Withholding broadband and other underlying basic transmission channels from certain customers can lessen a customer's ability to obtain the transmission characteristics it desires, and restrain competition.[40] We believe that a carrier should identify in its tariff the general type of carrier system technology employed in an offering, or the range of fungible carrier systems that would be so employed. But, as a general matter a carrier should not be required to identify the specific facilities used in a given service. For example, it is sufficient for a carrier to specify in its tariff that, under a given rate structure or a given rate element, analog carrier systems are used; it is not necessary to show what types of landline or radio carrier systems are employed or whether the systems are provided via satellite or terrestrial facilities, unless such distinctions are otherwise relevant to the service characteristics or cost of providing the offering. A tariff's private line building blocks should reflect generic categories of actual plant, such as analog versus digital channels, and time versus frequency division techniques. Basic building blocks in AT&T's actual transmission plant available for the provision of private line services include the following facility types: 4 kHz channels (voice-grade), 48 kHz channels (group), 240 kHz channels (analog, supergroup), 2400 kHz channels (mastergroup), 56

[40] *See* comments filed in June 1980 by Western Union Telegraph Co. at 6-15, Ad Hoc Telecommunications Users Committee at 16-20.

kbps channels, 1.544 Mbps channels (digital, including T-1 type carrier systems), 6.3 Mbps channels, telegraph-grade channels, and direct current/metallic channels. An offering should identify which, or what sets, of these transmission channel types is used in a specific service.

23. *Consistently Defined Rate Elements.* The fourth guideline we adopt requires all rate elements involving the same service functions to carry the same name and definition. Definitions of rate elements should identify the service functions or parts thereof covered by each rate element and enable us to develop consistent correlations with underlying cost elements associated with each rate element. Perhaps a carrier can justify charging different prices for the same rate element in different offerings based on cost, competitive necessity, or some other grounds. If so, the rate structures should reveal this rate difference on simple inspection and the justification should also be clearly presented. In the *Notice* we cited several examples of inconsistency in rate element use, including different coverage of the rate element "interexchange channel" in Series 2000/3000 and Series 4000, and inconsistent use of the "facility equipment package" rate element for intracity and intercity channels in the BSOC 6 tariff.[41] We also found totally different nomenclature used to designate similar or identical rate elements under different rate structures, such as calling the intercity transmission line-haul function "base capacity" in the TELPAK tariff, "facility section" under BSOC 6, and "interexchange channel" under Series 1000-4000.[42] When a carrier introduces a new rate element in a new service, its functional distinction from other rate elements in other services should be clear.

24. Our support for a guideline requiring consistently defined rate elements is illustrated by our concerns about two proposed tariffs. In the first, AT&T proposed a separate local distribution channel rate element for pricing 56 kpbs DDS connections to BPSS machines at AT&T central offices. A local distribution channel rate element, however, already existed in the tariff which covered all DDS connections within a given DDS serving area, regardless of the premises at which the customer station was located. Furthermore, the rate proposed for the BPSS connection was about one-fifth the generally-applicable rate for local distribution channels. The Tariff Division required justification for this inconsistent use and pricing of a rate element; AT&T subsequently deleted the proposed inconsistent rate element in the BPSS tariff.[43] Also,

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[41] *Notice*, 74 FCC 2d at 243-44. *See also* Associated Press v. FCC, 452 F.2d 1290, 1300 (D.C. Cir. 1971) ("[n]ot every variation in prices charged customers for a particular feature of the carrier's service supports a claim of unlawful discrimination").

[42] *Id.* at 244-45.

[43] Letter from Chief, Tariff Division to W. E. Albert, AT&T (March 10, 1982). *See* AT&T: BPSS, 94 FCC 2d 48, 59-60 (1983); AT&T: BPSS, 91 FCC 2d 1 (1982).

our order on the ECA tariff pointed to possible overlaps and inconsistencies in the uses of "Design Change Charge" for "engineering review" versus "Additional Engineering Charge" for "engineering or engineering consultation;" in uses of "Expedited Order Charge" versus special construction charges and additional labor charges applied in situations where expediting is necessary; and in uses of Planned Facilities Order versus Access Order versus Special Construction Order.[44] These overlapping and inconsistently-applied rate elements foster customer confusion and discretion for the carrier to impose discriminatory charges. Rate elements should be consistently defined and employed.

25. AT&T's Initial Proposal did not conform with this guideline. The proposed nomenclature and rate elements did not correspond to underlying functions in a consistent manner. The service functions which in the Basic Private Line Channels tariffs were covered by the LDS and IOS rate elements appeared under the NAL and INT rate elements in the Augmented Private Line Services tariffs. In addition, the Node for augmented services could have been the same functional entity as the SWC for basic channels. The guidelines seek to avoid such structural differentiation which impairs comparisons among and between services using the same underlying plant.

26. Under AT&T's Modified Proposal, two rate element designations were proposed for central offices, "Node" and "SWC". These rate elements were not mutually exclusive. While a Node was a central office where certain engineering functions (e.g., bridging and switching) were provided, the same functions often could be provided at a central office designated as a SWC for certain customer locations. When a customer's SWC does not provide these functions, the customer may be charged for a channel connecting his SWC to a Node. No such charge applied when a customer's SWC provided these functions, as when a customer's CCSA switch was located in a SWC with Node functions. Discriminatory pricing could result from a rate structure giving a carrier discretion to determine rate element designations and customer charges through decisions on where to locate certain equipment and how to route a customer's lines. The resulting discriminatory rate structure favors customers using colocated SWCs and Nodes as opposed to customers not using the optional functions of a Node or using Nodes not colocated with their SWCs. While this problem is reduced for AT&T's tariffs post-divestiture, it persists in the special access tariffs of exchange carriers. In all such cases, it would be preferable to charge for a service function regardless of intraexchange physical routing. *See* paras. 11, 16, 19, *supra.*

27. In connection with this guideline, we are also concerned about inconsistent uses of the LDS and IOS rate elements in AT&T's Modified

[44] *ECA Tariff Order,* at 5-1, 5-15, 5-18.

Proposal. There is no rate element proposed which simply covers the channel connecting a customer-designated location to a central office where connection to an interexchange transmission link can be made. In some cases this function is covered by the LDS rate element while in others it is covered by the LDS plus IOS rate elements. This appears to shift costs for certain private line customers from local distribution to interexchange channels. It would be preferable to have a single rate element cover the same service functions in all cases so that, among other benefits, cost elements could be consistently matched with service functions. Rate elements of lesser functional scope, comporting with demand characteristics, could also be defined in accord with Guideline Three.

28. *Simple Rate Structures.* We also adopt a fifth guideline, that rate structures, and associated terms and conditions, should be simple and easy to understand. Tariffs should be complete in themselves, using cross-references only to avoid complexity or excessive length. Definitional ambiguities and complexities impair analysis of rate structures by the Commission and selection of the most advantageous services and options by customers. Thus, tariffs must be structured in a logical fashion which first defines the service being offered and then the discrete units of service for which the customer will be charged. The *Notice* cited examples of poorly-defined terms and convoluted definitions in AT&T's Tariff 260 and the BSOC 6 tariff.[45]

29. The Commission's support for this guideline is reflected in our rules. *See* 47 C.F.R. §§ 61.55(f) (requiring clear and explicit explanatory statements regarding the rates and regulations contained in the tariff), 61.55(g) (requiring a clear and definite statement of the general rules, regulations, exceptions, and conditions which govern the tariff), 61.55(h) (requiring an explicit statement of charges and geographic availability of a service arranged in a simple and systematic manner, and prohibiting use of complicated or ambiguous terms). In 1981 we rejected by Bureau order a tariff covering Exchange Network Facilities for Interstate Access (ENFIA) in part because it violated 47 C.F.R. § 61.55(f).[46] The tariff was unclear as to when ENFIA charges apply in an MTS or WATS resale situation. Revisions to an OCC Facilities Tariff were rejected as unclear and confusing by Bureau order in 1982.[47] The revised tariff stated that certain facilities offered therein may not be used in the provision of Execunet/Sprint-type or any other end-to-end MTS/WATS-type interstate

[45] *Notice, supra,* 74 FCC 2d at 241-43.

[46] AT&T: Revision to Bell System Operating Companies Tariff F.C.C. No. 8, ENFIA, Mimeo No. 1153 (released May 29, 1981).

[47] AT&T: Facilities for Other Common Carriers, Mimeo No. 5363, at 5-6 (released July 27, 1983).

service; for such uses the customer was referred to the ENFIA tariff. However, the ENFIA tariff, in seeming contradiction, stated that those facilities would be provided in accordance with the regulations, rates and charges in the tariff subject to the proposed revisions. The order recommended eliminating (1) the cross-referencing provision which created the impression that somewhat different facilities are or could be offered under the ENFIA tariff and that different rates are or could be applicable, and (2) the use restrictions in the proposed revisions. Another Bureau order rejected as ambiguous a tariff which did not clearly indicate whether the service in question—physically-intrastate 1.544 Mbps channels for interstate use in connection with private communication systems—was to be offered under state tariff exclusively or concurrently under both state and federal tariffs.[48]

30. The *ECA Tariff Order* pointed to several ambiguous terms and provisions which caused confusion about applications of the proposed rate structure, including the definitions of "Interstate Customer" versus "End User," failure to set forth in a single tariff provision the applications of and exemptions to the Special Access Surcharge, and unspecified provisions such as "additional charge may apply." We also objected to the numerous instances in which rates for service elements were not set forth in the tariff but rather were to be established on an "individual case basis." We stated that generally-applicable regulations and rates for these service elements should be set forth in the tariff upon the first customer order.[49]

31. To illustrate further the application of this guideline, we find that AT&T's Initial and Modified Proposals did not present a simple, easy-to-understand rate structure.[50] Both proposals use distances between SWCs, calculated on the basis of distinct vertical and horizontal coordinates for each SWC, to develop charges for intercity as well as intracity channels. This is in contrast to the historic practice for intercity channels of using a single set of vertical and horizontal coordinates for all customer-designated locations in a given city. The proposals will add thousands of new coordinates and thereby complicate rate calculations for the carrier and customers. Also, instead of being able to determine the rate center from the city name itself, customers would have to determine rate centers based on SWCs from the first three digits of the telephone number of each customer-designated location. There could be no simple mileage matrices for rate calculations; rather than showing mileages between major cities,

[48] AT&T: 1.544 Mbps Channels for Connection With Private Interstate Communications Systems, Mimeo No. 636 (released November 8, 1983). *See also* U.S. Department of Defense, *supra*.

[49] *ECA Tariff Order*, at Appendix D, 2-75, 7-63, 6-15, 11-2, 12-2.

[50] *See* comments filed in March 1980 by Ad Hoc Telecommunications Users Committee.

the matrices would have to include thousands of street addresses or area codes and three-digit telephone number prefixes. Moreover, customers requiring switching, bridging or other functions provided at Nodes would have to find out from the carrier where these Nodes are located to determine the distances between the SWCs and Nodes. Under present tariffs, multi-point channels are configured for pricing purposes so that the least number of intercity channel miles results, regardless of actual physical routing. The proposals leave unclear whether this practice would apply. In any case, massive efforts to reconfigure and reprice private line systems would result from the SWC pricing approach. We are not convinced that the costs of the complexity generated by this pricing approach are outweighed by any benefits which would make the rate structure in the public interest.

III. *Volume Discounts*

32. The *Notice* discussed our standards for private line volume discounts established through a series of decisions on AT&T's TELPAK offering.[51] Under those decisions, the following standards apply to volume discounts:[52]

(1) The discriminatory bulk discount classification must be cost justified, i.e., it must be proved that there are material cost savings associated with provision of the service on a volume basis.

(2) The discount rate must be an exact reflection of such cost savings and must also be targeted to recover full costs on an FDC [Fully Distributed Cost] basis.

(3) Absent proof of cost justification, or upon departure from FDC Method based rates which mirror actual cost savings, no discriminatory discount rates may be filed absent a waiver. Waiver may be granted upon proof that the rate differential is required by competitive necessity,[53] or upon other policy considerations.

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[51] AT&T (Docket No. 18128), 61 FCC 2d 587, 656 (1976), 64 FCC 2d 971, 985-87 (1977), *aff'd in part sub nom.* Aeronautical Radio, Inc. v. Federal Communications Commission, *supra. See also* American Trucking Associations, *supra*, 377 F.2d at 124-27.

[52] *Notice*, 74 FCC 2d at 250-51.

[53] To show competitive necessity, the carrier must show, *inter alia*, (1) the existence and extent of alternative supply sources on a route by route basis; and (2) the attractiveness of alternatives for a particular user, addressing concerns of size, variability, growth characteristics, route and length of haul, economic considerations, service quality, reliability and flexibility. *Id.* at 251. The D.C. Circuit affirmed the Commission's finding that AT&T failed to prove that TELPAK A and B rates were justified by competitive necessity. *American Trucking Associations, supra.* In AT&T v. FCC, 449 F.2d 439, 449-50 (2d Cir. 1971), the Second Circuit affirmed the Commission's requirement that, in order to meet the burden of proving competitive necessity to justify discriminatory restrictions on sharing TELPAK, AT&T must show "more than a probability that a significant number of customers would shift to" an alternative. Rather, AT&T must show that those customers eligible to benefit from the practice "*would* in fact shift" to the alternative.

The Notice expressed our concern that limitations on volume discounts may cause inefficiencies in use of telecommunications facilities, contrary to a goal of the Communications Act, 47 U.S.C. § 151. We proposed that where volume discounts are reflected in rate structures, the carrier must explain the quantities at which the discounts would apply, the amounts of the discounts, the basis for the discounts, and any significant restriction in use or by classification of customer.[54] We also asked a variety of questions to evaluate the effects of volume discounts.

33. AT&T commented that volume discounts can be an effective means by which to advance the public interest goals expressed in the Communications Act. AT&T stated that, with the growth of competition in telecommunications services, the Commission should apply more liberal standards for lawful volume discounts.[55] Other commenters emphasized AT&T's dominance and the threat to competition of more liberal standards for volume discounts.[56]

34. In *Aeronautical Radio, supra,* 642 F.2d at 1230, the D.C. Circuit upheld the Commission's discretion to apply an FDC standard for determining just, reasonable, and nondiscriminatory rates. The Court stated that an FDC standard should not be an inflexible barrier to rate competition because the Commission's order contemplated lawful departures from FDC pricing when the carrier can justify them on the grounds of efficiency, competitive necessity, or other public interest grounds (*citing* 61 FCC 2d at 663-68). An argument favoring the FDC standard over an incremental cost approach recognized by the Commission and court is that the former is more susceptible to regulatory control and leaves the carrier less discretion to discriminate.

35. For the reasons discussed *infra,* we believe that we should not apply a strict FDC standard with a stringent showing of competitive necessity to all volume-discounted private line and special access offerings. Our scrutiny of volume discounts will depend primarily on structural considerations—volume-discounted offerings should be integrated into a rate structure of similar service offerings with no restrictions on customers or uses. This integration, together with our policies promoting resale, sharing, and reasonable interconnections, will limit a carrier's ability to discriminate. It is easier and more beneficial to the public interest for the Commission to limit discrimination by inspecting a carrier's rate structure than by delving into a carrier's detailed cost

[54] *Id.* at 254-55.

[55] *See* Comments filed in January 1980 by AT&T at 84.

[56] *See* comments filed in March 1980 by Ad Hoc Telecommunications Users Committee at 27-28, MCI Communications at 13-19, Southern Pacific Communications Co. at 7-9, and Western Union Telegraph Co. at 7-15.

justification applying an FDC standard, incremental cost approach, or some other pricing practice.

36. We first consider the question of whether all volume discounts which cannot be justified through an FDC study injure competition to the detriment of consumers. There is a difference between injuring competition and injuring, or even forcing into bankruptcy, a competitor.[57] Inefficient competitors can be driven out of a market by normal price competition; yet, this competition benefits consumers by lowering the price and raising the quality of services and products available to them. In contrast, actions which exclude efficient competitors from a market may harm consumers by allowing the remaining firm or firms profitably to provide unreasonably high-priced or poor-quality services and products. In two recent antitrust cases, TELPAK was found not to be predatorily priced.[58] The Seventh Circuit rejected an FDC standard for predatory pricing:[59]

> Pricing at or above long-run incremental cost in a competitive market is a rational and profitable business practice. Because there are legitimate, and in fact compelling, business reasons for pricing products at or above their long-run incremental cost, no predatory intent should be presumed or inferred from such conduct.

The court then addressed the benefits to consumers of allowing a carrier to price a volume-discounted service in excess of its long-run incremental cost but below an FDC standard:[60]

> Constraining AT&T to FDC pricing of its competitive services thus runs the risk of permitting actually or potentially less efficient competitors to serve a growing segment of the telecommunications market and thus deprive consumers of the benefits of price competition.

Many other courts and scholars found that maintaining a price floor above marginal cost, such as FDC pricing for volume discounts, encourages underutilization of productive resources and impairs competition on the basis of relative efficiency.[61] These results are contrary to the goals of the

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[57] *See, e.g.*, National Society of Professional Engineers v. United States, 435 U.S. 679, 691 (1978); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

[58] MCI Communications Corp. v. American Telephone and Telegraph Co., 708 F.2d 1081, 1130-31 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); Southern Pacific Communications Co. v. American Telephone and Telegraph Co., 556 F.Supp. 825, 914-72 (D.D.C. 1982).

[59] *MCI*, 708 F.2d at 1123.

[60] *Id.* at 1125.

[61] Northeastern Telephone Co. v. American Telephone and Telegraph Co., 651 F.2d 76, 87 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). No court has recently held that pricing below FDC is *per se* predatory, with several courts expressing their approval for a marginal cost test. *See, e.g.*, International Air Industries v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975) ("forcing a monopolist to charge a price higher than marginal cost could reduce industry output and waste economic resources in the short-run"), *cert. denied*, 424 U.S. 943 (1976); Superturf, Inc. v. Monsanto Co., 660 F.2d 1275 (8th Cir. 1981); Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790,

Communications Act.[62] We reject claims that all volume discounts for private line and special access offerings that cannot be justified by FDC studies are unjust or unreasonable because of injury to competition.

37. Another claim about volume discounts which do not comply with FDC pricing is that they involve cross-subsidies, thereby discriminatorily increasing the cost burden on small users. The argument here is that if large users pay rates that do not cover FDC, then small users must pick up the "shortfall," i.e., must pay rates covering more than FDC. This argument is flawed by overlooking the competitive alternatives that may allow large users to avoid paying rates equal to a particular carrier's FDC. In fact, these alternatives would allow the large users to avoid making any contribution to help cover the particular carrier's costs. These alternatives include other carriers' offerings as well as private microwave, satellite, and radio systems. Allowing a particular carrier to charge a rate between its marginal and fully-distributed costs may assure that a customer who might have turned to alternative sources of supply will help defer that carrier's costs that otherwise would fall on monopoly subscribers.[63] For certain services, a small user's rates may be lower when large

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797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 58 (1982); Barry Wright Corp. v. ITT Grinnell Corp., 724 F. 2d 227 (1st Cir. 1983). *See also* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); Baumol, Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing, 89 Yale L. J. 1 (1979); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L. J. 213 (1979); Zerbe & Cooper, An Empirical and Theoretical Comparison of Alternative Predation Rules, 61 Tex. L. Rev. 655 (1982). As to prices that exceed both "average" and "incremental" cost, "virtually every court and commentator agrees" that they are lawful under the antitrust laws, "perhaps conclusively, but at least presumptively." P. Areeda & D. Turner, Antitrust Law para. 711.1c at 118 (1982 Supp.).

[62] We have expressed our concern about the harmful effects of certain rate structures in causing incentives to use less efficient carriers and "uneconomic bypass;" such pricing threatens the Communications Act's goals of reasonable rates for services, widely-available telephone service, and efficient utilization of telecommunications facilities. MTS and WATS Market Structure, 48 Fed. Reg. 42984 (September 21, 1983), FCC 84-36 (released February 15, 1984); 47 U.S.C. § 151.

[63] "If AT&T were forced to price at FDC levels in competitive markets, its monopoly customers would probably be worse rather than better off. Because of the elasticity of demand in competitive markets, any rate substantially above [long-run incremental cost] would cause AT&T to lose business against an equally efficient competitor and, hence, decrease AT&T's actual revenue from competitive markets. There would thus be less revenue available from competitive services to contribute to the firm's joint or common costs, and monopoly customers would be required to provide a greater share of these costs." *MCI, supra*, 708 F.2d at 1124. *See also Northeastern Telephone, supra*, 651 F.2d at 90 (The plaintiff "seems to believe that whenever a product's price fails to cover fully distributed costs, the enterprise must subsidize that product's revenues with revenues earned elsewhere. But when the price of an item exceeds the costs directly attributable

users of that service are charged less than FDC prices, compared to when there is a smaller number of large users who are charged FDC prices. Volume discounts priced between FDC and marginal costs may promote reasonably-priced services for small as well as large users, a goal of the Communications Act, 47 U.S.C. § 151.

38. A related concern focuses on discrimination. The mere offering of volume discounts to all people does not make them permissible under the Communications Act.[64] The five guidelines adopted in this Order should help decrease the possibility of having two similarly-situated customers who order the same quantity of a service with volume discounts charged different rates. Any such rate structure would be unlawfully discriminatory. For example, a carrier cannot lawfully restrict the customers or uses for a volume-discounted offering.[65] In particular, resellers and sharers must be allowed to take a volume-discounted offering on the same terms as a single, high-volume customer.[66] Resale and sharing helps many small users benefit from volume discounts. Volume discounts should be offered without indirect restrictions on resale and sharing, *e.g.*, requiring a long notice period before a customer can discontinue using a service, onerous ordering and deposit requirements, and technical impediments to resale. Integrated, consistent rate structures and these market forces also limit a carrier's financial incentives to develop volume discounts designed to favor a few customers. When many customers are able to use a volume-discounted offering, the carrier may lose revenues from some customers who would have been willing to pay non-discounted rates for the service but instead take advantage of a volume discount (1) by selecting that offering from an integrated, consistent rate structure, or (2) through resale, sharing, or interconnection with the volume-discounted offering.

39. Competition is growing for all domestic services offered by all carriers.[67] A less rigorous evidentiary burden would be in the public interest for showing that a volume discount for a private line or special access offering is not discriminatory because it meets competition and thereby promotes reasonable rates for all users. The Supreme Court held in 1983 in a price discrimination case under the Robinson-Patman Act that

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to its production, that is, when price exceeds marginal or average variable cost, no subsidy is necessary. On the contrary, any surplus can be used to defray the firm's non-allocable expenses.").

[64] American Trucking Associations, *supra*, 377 F.2d at 131.

[65] *See* AT&T: BPSS, *supra*; AT&T: First Satellite-Based Private Data Service Offering, *supra*.

[66] Resale and Shared Use, 60 FCC 2d 261 (1976), *aff'd sub nom.* AT&T vs. Federal Communications Commission, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 895 (1978); Resale and Shared Use of Domestic Public Switched Network Services, 83 FCC 2d 167 (1980).

[67] *See* Competitive Carrier Rulemaking, *supra*; Long-Run Regulation of AT&T, *supra*.

"a seller must limit its lower price to that group of customers reasonably believed to have the lower price available to it from competitors."[68] The Court found that a business choosing to price on a territorial rather than customer-by-customer basis can meet its burden of proving competitive necessity by showing that "a reasonable and prudent businessman would believe that the lower price he charged was generally available from its competitors throughout the territory and throughout the period in which he made the lower price available."[69] For purposes of Section 202 of the Communications Act, a carrier may be able to meet its burden of proving a competitive-necessity justification for a lower rate without showing that each customer taking the discounted offering actually would switch to an equal or lower priced alternative. A carrier's proof should include a showing that (1) an equal or lower priced competitive alternative – a similar offering or set of offerings from other common carriers or customer-owned systems – is generally available to customers of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet competition without undue discrimination; and (3) the volume discount contributes to reasonable rates and efficient services for all users. We will assess the adequacy of the competitive-necessity justification on a case-by case basis until we are able to develop additional standards in this area.

40. In light of this analysis, we find that requiring all private line and special access volume discounts to be justified by an FDC study does not promote the goals of the Communications Act.[70] Greater pricing flexibility in volume discounts may benefit large as well as small users, not injure competition, and not be discriminatory. An integrated rate structure without customer or use restrictions would limit opportunities for discrimination, and thereby replace the need for detailed cost justification applying a particular pricing standard. In addition, competitive necessity may justify volume discounts when equal or lower priced alternatives are generally available to a carrier's customers. These findings lead to two sets of questions about new guidelines for private line and special access volume discounts.

41. First, how should volume discounts fit into rate structures for private line services? In Section II *supra*, we criticized AT&T's proposal for Basic 24 because it was not part of the same rate structure as the Basic 1 offering, and because it would limit the availability of T-1 digital carrier systems to a package with groups of long-haul channels and

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[68] Falls City Industries v. Vanco Beverage, 103 S. Ct. 1282, [1983-1] Trade Cas. (CCH) para. 65,282, at 69,661 (1983).

[69] *Id.*

[70] The Commission does not here address the issue of volume discounts for switched services.

interface devices. Offerings with volume discounts should be integrated into the same rate structures as similar, lower-volume offerings. These integrated rate structures should not restrict the availability of any offering or volume to particular customers or uses, or otherwise erect barriers to resale, sharing, and interconnection. Nor should they provide for more or less bundling for offerings with different volumes. We seek to eliminate the carrier's ability to discriminate by targeting a volume discount to a particular segment of customers through restrictions. In addition, if the generic categories of plant used for offerings in a rate structure differ with the volume of the offering, the rate structure should show those differences and explain why certain categories of plant are associated with certain volumes.

42. Second, what is a reasonable maximum rate for an offering, such as for small users of a service which has a volume discount below FDC pricing, and what is a reasonable minimum rate for a volume discount? The Commission prescribed an Interim Cost Allocation Manual designed to allocate AT&T's costs between four categories of services: MTS, WATS, all of AT&T's private line services, and AT&T's Exchange Network Facilities for Interstate Access (ENFIA) services.[71] We required AT&T to file tariff revisions targeting the earnings for each of the first three categories at the prescribed rate of return for interstate operations. A more liberal volume discount policy could be implemented without disrupting this regulatory scheme;[72] the category of all of AT&T's private line services and all of an exchange carrier's special access services would have rates targeted to earn a lawful rate of return. We will consider each volume discount for a private line or special access service individually until we develop sufficient experience to establish pricing guidelines. We do not hereby adopt a marginal cost, long-run incremental cost, average variable cost, or any other specific standard for the reasonableness of volume discounts. Our primary concern will be whether the discount fits into an integrated rate structure of similar service offerings. We will also look to whether the volume discount contributes to meeting competition, as described in para. 39 *supra*, and to reasonable rates and efficient services for all users.

IV. *Conclusion and Ordering Clause*

43. In conclusion, we believe that compliance with the preceding guidelines and findings regarding volume discounts will benefit consum-

[71] AT&T: Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384, *reconsid.*, 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunications Corp. v. Federal Communications Commission, 675 F.2d 408 (D.C. Cir. 1982); AT&T: Equalization Filing, *supra.* After divestiture, AT&T does not provide ENFIA services.

[72] We are examining possible revisions to this regulatory scheme in Long-Run Regulation of AT&T's Basic, Domestic, Interstate Services, *supra.*

ers and competition, and decrease the burden of tariff review on the Commission and carriers. Consumers will benefit from rate structures which facilitate detection and prevention of unjust, unreasonable, and discriminatory terms and conditions, and facilitate rapid implementation of services that consumers want. Simple rate structures will help consumers choose the most attractive service options for them. Small and large users also will benefit from efficiently-priced, volume-discounted offerings by which large users help cover a larger share of a carrier's non-traffic sensitive costs. Competition will benefit from rate structures which are nondiscriminatory, facilitate selection of the most advantageous offerings and make unbundled facilities and any volume-discounted offerings available to interconnected and resale carriers. Also, compliance with these guidelines and findings can speed the Commission's tariff review and complaint processes. Finally, carriers filing tariffs that comply with these guidelines and findings will gain flexibility and save costs from faster tariff review.

44. We adopt the guidelines and findings in this Order pursuant to 47 U.S.C. §§ 154(i), 201-05. The attachment shows the five guidelines as rules. The guidelines set forth herein are effective on the date of publication in the Federal Register.[73] SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

ATTACHMENT

Part 61 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

§ 61.40 [New] Private Line Rate Structure Guidelines

(a) The Commission uses a variety of tools to determine whether a carrier's private line tariffs are just, reasonable, and nondiscriminatory. The carrier's burden of cost justification can be reduced when its private line rate structures comply with the following five guidelines.

(1) Rate structures for the same or comparable services should be integrated;

(2) Rate structures for the same or comparable services should be consistent with one another;

(3) Rate elements should be selected to reflect market demand, pricing convenience for the carrier and customers, and cost characteristics; a rate element which appears separately in one rate structure should appear separately in all other rate structures;

(4) Rate elements should be consistently defined with respect to underlying service functions and should be consistently employed through all rate structures; and

[73] The Commission finds that because these guidelines will facilitate the development and review of tariffs and public benefits will be derived from putting them into effect without delay, an immediate effective date is in the public interest. 5 U.S.C. § 553(d).

(5) Rate structures should be simple and easy to understand.

(b) The guidelines do not preclude a carrier, in a given case when a private line tariff does not comply with these guidelines, from justifying its departure from the guidelines and showing that its tariff is just, reasonable, and nondiscriminatory.

Concurring Statement of FCC Commissioner James H. Quello

In re: Private Line Rate Structure and Volume Discount Practices, CC Docket 79-246.

I am concurring in this matter only because the majority seems to perceive significant administrative utility and because there have been sufficient expressions of concern to alert the Common Carrier Bureau to the dangers of a doctrinaire application of the guidelines. I remain unconvinced that the guidelines provide much useful guidance to the carriers. On the other hand, the guidelines lend themselves to subjective application leaving the carriers to guess at which of two or more conflicting goals is paramount in any given tariff review. I am in full accord with the advice given the Commission by its Office of Plans and Policy which warned that a strict interpretation of all of the guidelines would permit a finding that any conceivable tariff is unlawful.

I am not suggesting that, at this point, the Commission no longer has a tariff review responsibility. We must continue to scrutinize the tariffs filed by the dominant carrier and the operating companies to ensure that they do not abuse their market power. The other side of that coin requires that the Commission not make unreasonable or impossible demands for a precision which is both unreasonable and unnecessary. To the extent the guidelines are interpreted so as to unnecessarily restrict the carriers' ability to experiment with new rates or offerings, they can only harm the public interest.

I support the majority's finding (at para. 40) that requiring all private line volume discounts to be justified by a fully distributed cost (FDC) study does not promote the goals of the Communications Act. Marginal cost is the only rational basis for pricing in a competitive world.

SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

Re: PRIVATE LINE RATE STRUCTURE AND VOLUME DISCOUNT PRICES
(CC Docket 79-246)

I support these guidelines to the extent they move the Commission's tariff review process away from detailed cost analysis. However, while I believe the guidelines are sound in concept, I remain concerned that they not be applied in such a manner as to unduly restrict AT&T's ability to

develop new and innovative rates and rate structures in response to increasing competition.

My concern with a static application of these guidelines is particularly heightened by the staleness of the record in this proceeding. The industry has experienced fundamental changes since the record was closed four years ago, the most significant of which is AT&T's divestiture of its local exchange facilities. Absent such control over the local bottleneck, AT&T cannot use its former local monopoly services to engage in unlawful practices or anticompetitive behavior. Moreover, the Bell Operating Companies are required to provide all competitors equal access to the bottleneck facilities. As such, divestiture provides a market structure in which interstate carriers may effectively compete.

Other events have also changed the complexion of the industry, including the Commission's *Computer II* and *Competitive Carrier* decisions,* in which CPE and enhanced services were deregulated and tariff and facilities regulation was streamlined or removed for competitive carriers. These developments, coupled with divestiture, will result an increasing level of competition for AT&T now and in the future.

The guidelines we adopt today must be applied to new rates and rate structures flexibly with these significant changes in mind. The Commission must remain cognizant of the need to responsibly tailor its regulatory review to fit the realities of an evolving marketplace.

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* Second Computer Inquiry, 77 FCC2d 384, *reconsid.* 84 FCC2d 50 (1980), *further reconsid.*, 88 FCC2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C.Cir. 1982), *cert.* denied, 103 S. Ct. 2109 (1983); Competitive Carrier Rulemaking, 77 FCC2d 308 (1979) (Notice of Inquiry and Proposed Rulemaking), 84 FCC2d 445 (1981) (Further Notice of Proposed Rulemaking), 85 FCC2d 1 (1980) (First Report and Order), 91 FCC2d 59 (1982) (Second Report and Order), *reconsid.* FCC 83-69 (released March 21, 1983), Mimeo No. 012 (released Oct. 6, 1983) (Third Report and Order), FCC 83-481 (adopted Oct. 19, 1983) (Fourth Report and Order).

Common Carrier, Mobile Radio
Domestic Public Land Mobile Radio Service
Objective Need Standards
Paging Service

Final rule adopted establishing objective need standards for applicants requesting one additional frequency on a paging system. To obtain an additional paging frequency an applicant must demonstrate that existing facilities have thirty minutes or more occupied air time during the bouncing busy hour.
—*Public Mobile Radio Service*
Docket No. 20870

FCC 84-179

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service	Docket No. 20870

FOURTH REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1984; Released: July 17, 1984

BY THE COMMISSION:

1. Section 309(a) of the Communications Act of 1934 requires the Commission to find that the "public interest, convenience and necessity" will be served before granting a common carrier radio license. To fulfill that mandate, we determine whether an applicant "needs" the frequency, that is, whether there is an existing or identified future demand for service on the proposed frequency. In this proceeding, we have been exploring, among other things, methods by which we could assure in a simple and objective manner that applicants would construct and operate the facilities they proposed under Part 22 of our rules.[1] In this phase of

[1] This proceeding was initiated by a *Notice of Inquiry and Notice of Proposed Rulemaking*, 61 FCC 2d 266 (1976); *First Report and Order*, 69 FCC 2d 398 (1978) (elimination of prior state certification requirement); *Second Report and Order*, 89 FCC 2d 1199 (1982) (elimination of need showing for one initial two-way channel); *Third*

the proceeding we requested comments with regard to the adoption of objective need standards for applications requesting an additional paging frequency. *Further Notice of Proposed Rulemaking* (*Further Notice*), FCC 83-38, 48 Fed. Reg. 9048 (1983). The objective need standards proposed in the *Further Notice* were adopted on an interim basis. In this Report and Order we make the objective need standards final, with some modifications.

2. Before the adoption of interim standards for one-way applications, our rules did not contain objective standards to be met when attempting to demonstrate need for proposed additional frequencies.[2] Applicants requesting additional channels were required to submit traffic loading studies pursuant to Section 22.516 of the Commission's rules, 47 C.F.R. § 22.516. The criteria for demonstrating need for initial channels evolved primarily out of two leading cases.[3] These criteria, however, did not provide a uniform basis for evaluating applications. The time-consuming process of assessing various subjective showings of need on an *ad hoc* basis has imposed significant burdens on applicants as well as on the Commission. The lack of clear, uniform standards has also hindered our efforts to assure that the public is served adequately and that the spectrum is used efficiently. Our experience using objective need standards for two-way service (and, on an interim basis, for one-way service) convinces us that the adoption of objective need standards for one-way service is in the public interest.

3. In response to our *Further Notice* we received comments from American Telephone and Telegraph Company (AT&T) and Telecator Network of America (Telocator). Both commenters generally supported our goals of establishing certainty as to what is required to demonstrate need and of promoting spectrum efficiency. However, both AT&T and Telocator made a number of suggestions intended to simplify our proposal.

4. The comments addressed two main areas. The first of these was how the standard should be quantified. In the *Further Notice* we proposed to grant an additional channel on the basis of "grade of service" during the system's "bouncing busy hour."[4] This formulation followed

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Report and Order, FCC 83-53, 48 Fed. Reg. 8074 (1983) (objective need standards adopted for additional two-way channels).

[2] In Paging Systems—DPLMRS (CC Docket No. 80-183), 89 FCC 2d 1337 (1982), we eliminated the requirement that applicants for an initial one-way frequency demonstrate public need. We also established that no more than one initial or additional frequency would be granted to an applicant at a time.

[3] Long Island Paging, 30 FCC 2d 405 (Rev. Bd.), *review denied*, 32 FCC 2d 235 (1971), *recon. denied*, 34 FCC 2d 216 (1972). New York Telephone Co., 47 FCC 2d 488, *recon. denied*, 49 FCC 2d 264 (1974), *aff'd sub nom.* Pocket Phone Broadcast Service Inc. v. FCC, 538 F. 2d 447 (D.C. Cir. 1976).

closely the objective need standards adopted in this proceeding for two-way systems. *See* note 1, *supra.*

5. The second major topic of comment was our proposal to grant an additional channel to applicants who could project that their grade of service would rise to the prescribed level.[5] In order to determine whether an applicant has demonstrated need for an additional channel, we proposed that 80% of subscriber units for which there are written held orders and 80% of subscriber units projected through the use of a valid statistical survey were to be added to present subscriber units being served on the system. If this number of units would produce a projected grade of service of 0.50, then the additional channel would be granted.

Discussion

6. *Quantification.* Both commenters recommended that we adopt a need standard based on occupied air time,[6] rather than grade of service. Telocator and AT&T pointed out that, unlike two-way mobile systems, one-way systems are not trunked and that calculating a grade of service is therefore unnecessary. In a non-trunked system, a grade of service of 0.50 (the standard we had proposed to use) translates to 30 minutes of occupied air time. It is therefore unnecessary to calculate grade of service on an *ad hoc* basis for one-way systems. For the same reason, Telocator argued that there is no need to impose upon applicants the additional burden of submitting separate traffic loading data for the various kinds of paging units as the proposed rule would require.

7. We are persuaded by the commenters that an objective need standard measured in terms of occupied air time will better serve the public interest than the standard we proposed in the *Further Notice.* The rule we are adopting will ease administrative burdens both for the public and for our staff without undermining the goals we seek to achieve.

8. Occupied air time is a suitable measurement of need in the case of a non-trunked system.[7] Determining the occupied air time is a simple procedure and eliminates certain calculations that our proposed rule

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[4] Grade of service is the probability that a call will be blocked during the busy hour. The bouncing busy hour is the average of the busiest hour (most minutes of occupied time) on each of the three days for which traffic loading data are reported pursuant to Section 22.516 of our rules.

[5] *See* Further Notice, Appendix I, Proposed Section 22.16(c)(1) which states, in pertinent part, that if "the existing grade of service is 0.40 or greater with a projected grade of service of 0.50 or greater, the additional channel will be granted."

[6] The term "occupied air time," which is the term used by the commenters, is synonymous with "channel occupancy time" which is defined by Section 22.2 of the rules as "[t]he total time a channel is utilized for the transmission of communications, including necessary signaling. It does not include time waiting for a channel to become available."

[7] As this is not true for a trunked system, however, the modified rule that we adopt here would not be suitable for two-way systems.

would require.[8] This rule employs a different measurement of need than our objective need standard for additional channels on an existing two-way system. We believe that it is proper to distinguish between the two situations and that the simplicity of this rule outweighs any confusion that might arise due to the inconsistency of the two rules. Accordingly, we are adopting occupied air time of thirty minutes during the bouncing busy hour as the objective need standard for justifying an additional one-way channel.[9]

9. *Projected Grade of Service.* Both AT&T and Telocator criticize our proposal to grant an additional one-way channel based upon projected grade of service. AT&T believes that the method we propose for projecting traffic in the system is unduly complicated and will provide the Commission with distorted data. It also argues that the term "valid statistical survey" is too indefinite and labels the 20% discounting factor to be applied to held orders and survey results as arbitrary.

10. AT&T suggests an alternative method for determining when an additional channel should be granted. Under AT&T's proposal an applicant would determine its bouncing busy hour occupied air time for approximately 120, 90 and 60 days prior to the filing of the application. If, based upon a linear projection from these data, the applicant's occupied air time would reach 30 minutes within six months, an additional channel should be granted.

11. Telocator also criticizes our proposed methodology for projecting traffic in the system. Telocator contends that, rather than collecting held orders and statistical surveys, carriers would, and indeed should, simply begin serving potential customers. When channel occupancy reaches 30 minutes, an additional channel will be justified. Accordingly, Telocator's proposal contains no provision for meeting the need showing by projecting anticipated demand.

12. We have decided to adopt Telocator's suggestion in this regard.[10] Allowing applicants to use projected grade of service - or projected occupied air time - to demonstrate need for an additional channel would

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[8] For example, assume that the bouncing busy hour of each of the three days reported showed channel occupancies of 29.6, 30.4, and 30.0 minutes for each of the three days respectively. The average occupancy then is (29.6 + 30.4 + 30.0) /3 = 30.0 minutes. This corresponds to 30 (minutes) /60 (minutes/erlangs) = 0.5 erlangs. Referring to the Erlang C tables, for 1 trunk, this corresponds to a grade of service of 0.50 (50% probability of blocking).

[9] AT&T questioned the validity of the Erlang C Table in determining the expected grade of service, as proposed in the Further Notice. As we have adopted an occupied air time standard instead of a grade of service standard, we need not address this issue.

[10] Our decision to eliminate projected grade of service as a means of demonstrating need makes it unnecessary to discuss the merits of AT&T's proposed method versus our own. The use of demand projections as a means of determining whether an additional channel should be granted would introduce an unnecessary level of complexity into this process.

permit licensees to expand system capacity before reaching the prescribed level of channel loading. However, unlike two-way service, one-way service is unlikely to be seriously degraded before channel-loading reaches the thirty minutes of bouncing busy hour occupied air time specified in our final rule.[11] Our final rule will therefore be more spectrum-efficient than the rule proposed in the *Further Notice*. We therefore will not grant an additional frequency based on projected traffic or grade of service in the system, in the case of applications filed after the effective date of the new rule.

13. In light of our decision to adopt an occupied air time standard and to eliminate demand projections as a means of showing need, we see no reason to require applicants for one-way channels to submit separate Section 22.516 data for the various types of paging units. This requirement would be necessary only to calculate grade of service and to ensure the accuracy of grade of service projections but is not necessary when using an occupied air time standard. The modifications we have made render this provision superfluous.

14. *Sunset.* We note that the Commission has, to date, allocated in excess of seventy channels for one-way common carrier service. We have also authorized the provision of common carrier paging on broadcast subcarriers, *First Report and Order* in BC Docket No. 82-536, 48 Fed. Reg. 28445 (1983), *Memorandum Opinion and Order on Reconsideration*, FCC 84-187 (Adopted April 26, 1984), and we have provided frequencies for private carrier paging, *Paging Operations*, 91 FCC 2d 1214 (1982), both of which provide alternatives for paging service similar to that provided on the Part 22 paging frequencies. In view of the large number of channels allocated for these paging services and the private radio and broadcast substitutes, the risk of frequency warehousing is comparatively small. Nevertheless we continue to believe that for the interim we should use loading studies to encourage competition during the first few years these channels are available. Loading studies will encourage new business to enter markets and prevent existing licensees from requesting facilities they do not need, either because their demand will not support new channels for the foreseeable future or because they only wish to preempt new entrants. After all interested parties have had an opportunity to apply for paging frequencies, we do not see any need to continue using loading studies.

[11] Because a paging message is relatively short (having a typical duration of only a few seconds), the thirty-minute occupied air time standard will be unlikely to delay the transmission of a paging signal significantly. In addition, one-way systems commonly use message storage techniques, permitting a higher degree of channel occupancy without degrading the apparent grade of service (i.e., as perceived by the subscriber).

15. We are also concerned that if we immediately eliminated the requirement that applicants demonstrate need for additional channels, we would disrupt the orderly processing of the 5,500 low band and 900 MHz paging applications we received last year. Hundreds of these applications are already mutually exclusive or held in abeyance pending the outcome of the proceeding in *A.S.D. Answering Service, Inc.*, CC Docket No. 82-587, *et al.* The acceptance of hundreds, if not thousands, of new applications at this time from incumbents (as opposed to new entrants) would undercut the progress our staff is making with last year's filings. We could avoid this deluge by declaring a moratorium on filing until we have disposed of nearly all the pending applications, but that would be unfair to incumbents who have legitimate needs to expand their systems. Accordingly, we will retain a simplified objective loading standard for use at this time. This rule, together with the traffic load study requirement, shall terminate on January 1, 1986. Applicants filing for additional one-way frequencies after that date will no longer be required to demonstrate need for the requested channels.

Conclusion

16. The adoption of objective need standards for applications requesting one additional one-way frequency will serve the public interest. These standards eliminate uncertainty for applicants, clarify our policies and facilitate application processing. Moreover, spectrum efficiency will be achieved while providing service to the public in an efficient and expeditious manner.

Regulatory Flexibility Act - Final Analysis

17. *Need for Rules and Objective.* The rule adopts standards for the demonstration of public need for applications requesting an additional frequency for an existing one-way system. The rule is needed because it establishes clearly defined standards to be followed by applicants, thus lessening regulatory burdens for small entities. The rule streamlines, clarifies, and codifies existing regulations and policies and promotes the objective of providing service to the public in the most efficient and expeditious manner possible. Report and recordkeeping requirements remain the same as those used by applicants before the adoption of these rules.

18. *Issues Raised by the Public in Response to the Initial Analysis.* None.

19. *Alternatives that Would Lessen Impact.* We believe that the rule adopted herein will be less burdensome for small businesses than either the interim standards or the prior subjective approach. We considered the alternative of exempting small businesses from these requirements.

However, we determined that this approach would not lessen economic impact on small entities.

20. Authority for this rulemaking is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 303(r), and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

21. Accordingly, IT IS ORDERED, That Part 22 of the Commission's Rules and Regulations is amended as specified in the Appendix, effective immediately upon publication in the Federal Register.[12]

22. IT IS FURTHER ORDERED, That the above-captioned proceeding IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

47 C.F.R. Part 22 is revised as follows:

1. Section 22.16 is amended by revising paragraph (c) to read as follows:

22.16 *Objective Need Standards*

* * * * *

(c) Applications for a single additional one-way channel filed by January 1, 1986 will be granted if the Section 22.516 data submitted with the application shows that the channel occupancy time, as defined by Section 22.2 of the rules, of each channel in the applicant's existing system is thirty minutes or more during the bouncing busy hour.

(1) Applications for a single additional one-way channel shall not be subject to the requirements of Section 22.516(b)(2)(ii).

(2) Applications for a single additional one-way channel filed after January 1, 1986, will be acted on without reference to the loading on the applicant's existing system.

[12] Objective need standards for one way service have been in effect on an interim basis since April 4, 1983. Under Section 553(d)(1) and (d)(3) of the Administrative Procedure Act, 5 U.S.C. § 553(d)(1) and (d)(3), there is no need for publication or service prior to the effective date of this action.

FM Station, Authorization
Reciprocal Service
Suburban Community 307(b) Issue
Transmission First Local

Review Board affirmed grant to FM applicant meriting dispositive Section 307(b) preference for proposing first local transmission service to Midvale, Utah. Loser proposed West Jordan, already served by daytime-only AM station, as community of license; its inconsistent requests for waivers of 47 CFR §§ 73.1125 and 73.1130 denied. —Public Service B/cing of West Jordan, Inc.
BC Docket No. 82-366

FCC 84R-30

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PUBLIC SERVICE BROADCASTING OF WEST JORDAN, INC. West Jordan, Utah	BC Docket No. 82-366 File No. BPH-810819AJ
WALTER P. FABER, JR. Midvale, Utah	BC Docket No. 82-367 File No. BPH-810819BE
For Construction Permit for New FM Station	

Appearances

Bruce A. Eisen, on behalf of Public Service Broadcasting of West Jordan, Inc.; and *Donald E. Ward* and *Eric S. Kravetz*, on behalf of Walter P. Faber, Jr.

DECISION

Adopted: May 1, 1984; Released: May 2, 1984

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding currently involves the mutually exclusive applications of Public Service Broadcasting of West Jordan, Inc. (Public) and

Walter P. Faber, Jr. (Faber) for authority to construct a new FM broadcast station (Channel 274C) at West Jordan or Midvale, Utah, respectively. By *Hearing Designation Order*, 47 Fed. Reg. 30642, published July 14, 1982, these two applications (and seven others that were subsequently dismissed) were designated for consolidated comparative hearing to determine, in accordance with Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), which of the proposals would best provide a fair, efficient distribution of radio service; and, in the event that a choice among the applicants should not be based solely upon considerations relating to Section 307(b), to determine on a comparative basis which proposal would best serve the public interest.[1] An issue was subsequently added by presiding Administrative Law Judge John H. Conlin (ALJ) to determine, in the event that Midvale was found to be the preferred community under Section 307(b), whether Public, the West Jordan applicant, should be granted waivers of the Commission requirements set forth in 47 CFR §§ 73.1125 and 73.1130 pertaining to main studio location and program origination.[2] Tr. 22-25; *Order*, FCC 83M-188, released January 17, 1983. In an *Initial Decision* (*I.D.*), FCC 83D-66, released November 25, 1983, the ALJ resolved the Section 307(b) issue in favor of Faber, the Midvale applicant; determined that Public was not entitled to waiver of the Commission's main studio location and program origination rules, and thus could not be transformed into an applicant for Midvale; and granted Faber's application.[3] We have reviewed the *I.D.* in light of the exceptions, the reply briefs, and our examination of the record.[4] The Board adopts the findings of fact and conclusions of law in the *I.D.*, except as modified herein, and affirms the ALJ's grant to Faber.

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[1] Limited "financial qualification" issues were also specified against Public and Faber, and an air hazard issue was specified against Faber. These issues were resolved in the applicants' favor by summary decisions, *see I.D.* at n.2; and no exceptions have been taken to these rulings.

[2] Section 73.1125 of the Commission's Rules requires a station to maintain a main studio in its community of license except where "good cause" exists for locating the studio outside the principal community. Section 73.1130 provides that more than 50% of a station's non-network programs shall originate from the station's main studio or from points remote from the main studio but situated within the principal community.

[3] While the ALJ concluded that Faber was entitled to a dispositive § 307(b) preference, *I.D.*, Concls., paras. 4, 9, he also made findings under the contingent comparative issue, to which both Public and Faber except. Since we affirm Faber's dispositive § 307(b) preference, we need not reach the standard comparative issue or the exceptions related thereto. *See Beaufort County Broadcasting Co.*, 94 FCC 2d 572, 575, *recon. denied*, FCC 83R-73, released September 29, 1983 (Rev. Bd.); *WHW Enterprises, Inc.*, 89 FCC 2d 799, 812 (Rev. Bd. 1982), *review denied*, FCC 83-368, released September 15, 1983.

[4] Oral argument was not held because it would not have materially aided in the resolution of this case. *See* 47 CFR § 1.277(c); *Van Buren Community Service*, 87 FCC 2d 1018, 1019 (Rev. Bd. 1981). It was not requested in any event (for reasons that, we believe, will clarify *infra*).

2. The only exceptions of Public warranting some discussion argue that no Section 307(b) preference should have been awarded in this case because, first, the larger community of West Jordan does not have a full-service, but merely a daytime-only, station licensed to it; second, the ALJ erred in denying it waivers of the main studio location and program origination rules and, consequently, in determining that it failed to meet the requirements of the "reciprocal service doctrine" set forth in *Kent-Ravenna Broadcasting Co.*, 44 FCC 2603, 2607-08 (1961)[5]; and, finally, Public asserts that analysis of the recent decision in *Casey Broadcasting Co., Inc.*, 89 FCC 2d 618 (Rev. Bd. 1982), *rev. denied*, FCC 83-61, released February 24, 1983, shows that there can be no such discernible preference in this proceeding. We deny these exceptions.

3. The undisputed facts of record show that Midvale and West Jordan, although adjacent to one another, "are distinct communities, with separate local governments and governmental services; separate civic, social and fraternal organizations; separate business centers; and similar indicia of their individual character," *I.D.*, Concls. para. 3, and that Midvale (population 10,146) has no existing local broadcast outlet whereas AM broadcast Station KZZI is licensed to West Jordan (pop. 27,192). *I.D.*, Fdgs. paras. 4, 9. It is well-established that every community of appreciable size has a presumptive need for its own local transmission service, *see, e.g., Kaldor Communications, Inc.*, FCC 84R-26, released April 24, 1984 (Rev. Bd.), at para. 5 (and cases cited therein), and we have held on facts comparable to those at bar that an FM applicant proposing a first local transmission service to such a community is entitled to a dispositive Section 307(b) preference over an applicant proposing to serve a larger community that already has a daytime-only broadcast station licensed to it. *Bie Broadcasting Co.*, 81 FCC 2d 1, 24-29 (Rev. Bd. 1980), *review denied*, FCC 81-376, released July 31, 1981 (Comm'n). Accordingly, Public's first exception is denied.

4. Next, we agree with the ALJ that Public is not entitled to (hypothetical) waiver of §§ 73.1125 and 73.1130 of the rules. Even had Public shown the requisite "good cause" for belatedly amending its application to specify an "auxiliary" studio in Midvale—which it did not[6]—

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[5] The "reciprocal service doctrine" provides that an applicant for the less favored community under § 307(b) may be entitled to consideration under the comparative issue if, by engineering standards, it provides primary coverage to the preferred community and either complies with the main studio and program origination rules with regard to that community or otherwise justifies a waiver of those rules. *See Kent-Ravenna, supra.* There is no dispute here that Public will provide the requisite signal strength to Midvale.

[6] *See* 47 CFR § 73.3522 (application amendments proffered after a case has been set for hearing must show "good cause"); *see also Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970) (defining "good cause"). Public's post-designation proposal to place an "auxiliary" studio in Midvale was a flagrant attempt to "upgrade" its application, an

it has demonstrated no persuasive public interest reason for granting the waivers. A *public* interest, not a *private* one, is the *sine qua non* of waiver grants. *WAIT Radio* v. *FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Although the ALJ gave Public's tardy waiver request the requisite "hard look," he found that the applicant had not cleared the "high hurdle," *id.*, obstructing its path. *I.D.*, Concls. para. 7. Little wonder, because as the Board fulminated just recently in *Kaldor*,[7] the applicant's waiver request was no more than the usual legerdemain in substantial breach of the very "reciprocal service" recognition it simultaneously sought. As we pointed out in *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 713-714 (Rev. Bd. 1982), a general prerequisite to "reciprocal service" consideration is a proposed studio as well as actual program origination at the purported surrogate community. *See Kent-Ravenna, supra*, 44 FCC 2d 2607. We recognize that *Kent-Ravenna* itself apparently anticipated main studio location waiver requests. *See id.* But a *pari materia* reading of the relevant *Kent-Ravenna* text plainly affirms no corresponding anticipation that such requests would be routinely granted whenever the "reciprocal service doctrine" is invoked, lest the basic studio location and program origination elements of the "doctrine" become instantaneously self-cancelling. Here, apart from its waiver-laden proposal of an "auxiliary" studio in Midvale—Public's *second* after-the-fact tactic to attempt to overcome its evident Section 307(b) disadvantage[8]—Public's legal case is

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impermissible shift of a comparative position, about which attempts we recently waxed lengthy in *Daytona Broadcasting Company, Inc.*, FCC 84R-23, released April 20, 1984 (Rev. Bd. 1984), at paras. 5-6. Public's proposal to amend to provide an "auxiliary" studio is no more than a late "parry with an offer of more evidence," *Colorado Radio Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941), which will not be considered. Comparative "upgrading" is simply not permitted, even if couched within a waiver request.

[7] In *Kaldor* the Board engaged in a "thorough survey" of "reciprocal service doctrine" cases following *Kent-Ravenna, see* FCC 84R-26, *supra*, at para. 8, and—based on its observation of the flawed attempts by various applicants to invoke the "doctrine"—ventured that "... the reciprocal service 'doctrine' is only an artificial procedural gimmick lacking true public interest substance." *Id.*, at para. 9. Public's actions here seem to fit that description. The *Kaldor* Board went on to say that "... subject to further Commission guidance ... [w]e shall henceforth decline to give any serious consideration to the [reciprocal service] 'doctrine' in Section 307(b) determinations." *Id.*, at para. 10. Shortly after the Board's release of *Kaldor*, it received a copy of the Commission's brief filed in *WHW Enterprises, Inc.* v. *FCC*, No. 83-2067 *et al.* (D.C. Cir., filed March 2, 1984), in which it is stated that the appellant's assertion therein that the "reciprocal service doctrine has been 'interpreted ... out of existence' " is "wrong." Brief of FCC at n.7. It is obvious that the *WHW* brief preceded the views expressed by the *Kaldor* Board and were reflective of case law up to that point. However, as the Board noted in *Kaldor*, the views expressed therein are "subject to further Commission guidance." *See* 47 U.S.C. § 155(c)(5).

[8] Its *first*, of course, being its post-designation request for "reciprocal service" consideration to reflect a newfound solicitude for Midvale. Public's solicitude—as evidenced by

reduced to two conceptually opposed results: (a) a recognition of the "reciprocal service" it allegedly would provide the community of Midvale; and (b) a waiver relieving it of the general obligation to provide the principal indicia of such service. As with the pertinent applicant in *Kaldor*, Public cannot have it both ways in the absence of a showing that the *public* (as distinguished from *Public's*) interest would be served by granting waivers of the rules requiring a primary local transmission outlet to the subject community of Midvale.

5. Like the ALJ, we have given Public's waiver request (and its rather inconsistent "reciprocal service" plea) a "hard look." Even had we glazed our vision (a focus Public would more likely prefer), the applicable Section 307(b) law glints through, and Public's frenetic post-designation maneuverings are to no avail.[9] The Midvale applicant, Faber, is the preferred Section 307(b) applicant. *See, e.g., Bie Broadcasting Co., supra*, 81 FCC 2d at 16. Finally, Public's contention that *Casey Broadcasting, supra*, undercuts our action here is erroneous. In that case, the Board held that no Section 307(b) preference would be awarded to one applicant proposing to be dually-licensed to two discrete communities having no local broadcast outlets over a competing applicant proposing a *first local transmission service* to the larger community only. Here, we are simply applying the time-honored presumption favoring the community without a local broadcast outlet over another community *already having* such an outlet. While Faber's Section 307(b) preference is far from the strongest we have ever encountered, it is nonetheless sufficient to be dispositive. *See Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046, 1050-51 (D.C. Cir. 1977).

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the concurrent waiver requests—is not, however, unbounded, thus creating the present doubt that its on-again, off-again infatuation with Midvale is more than middling.

[9] To the great relief of all concerned, cases such as this and *Kaldor* (and associated § 307(b) maneuverings) are a dying breed, at least with respect to FM radio and television applications. Under its *Report and Order* in BC Docket 82-320, 93 FCC 2d 436 (1983) (Suburban Community, Berwick Doctrine, De Facto Reallocation Policies), future applicants for such frequencies must all apply for the precise community specified in the Commission's Tables of Assignments *and no other. See* 93 FCC 2d at 451-453. Applicants wishing to specify a community other than that listed in the Tables must do so by rulemaking at a *precomparative* stage, which is when the Commission's § 307(b) choice of communities will be made Thus, all future FM applicants coming under the *Report and Order* will be singing from the same sheet of music insofar as which particular community is "my kind of town." Moreover, Public's reliance on the *Report and Order* as support for its application is misplaced; if anything, the changes made thereunder heighten the importance of primary service and main studio location to the specific community of license, particularly in the case of small communities. *See, e.g.*, 93 FCC 2d at 451 (para. 31), 456 (para. 38) (Commission will measure performance by service fidelity to *specific* community of license).

6. All decisionally significant exceptions having been considered, we affirm the ALJ's ultimate conclusion that the Faber application, which merits a dispositive Section 307(b) preference over the Public application, will better serve the public interest, convenience, and necessity.

7. ACCORDINGLY, IT IS ORDERED, That the application of Walter P. Faber, Jr. (File No. BPH-810819BE) for authority to construct a new FM broadcast station at Midvale, Utah IS GRANTED, and the application of Public Service Broadcasting of West Jordan, Inc. (File No. BPH-810819AJ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D-66

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PUBLIC SERVICE BROADCASTING OF WEST JORDAN, INC. West Jordan, Utah	BC Docket No. 82-366 File No. BPH-810819AJ
WALTER P. FABER, JR. Midvale, Utah	BC Docket No. 82-367 File No. BPH-810819BE
For Construction Permit for New FM Station	

Appearances

Bruce Eisen, on behalf of Public Service Broadcasting of West Jordan, Inc.; *Eric S. Kravetz*, on behalf of Walter P. Faber, Jr.; and *Lawrence Bernstein*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued November 18, 1983; Released November 25, 1983

Preliminary Statement

1. The Commission, by Hearing Designation Order released July 8, 1982, designated for hearing nine mutually exclusive applications for a new FM broadcast service on Channel 274C. Seven of the applications have been dismissed, leaving the two applicants listed in the caption. Public Service Broadcasting of West Jordan, Inc. (Public Service) proposes West Jordan, Utah as its city of license, and Walter P. Faber, Jr. (Faber) proposes Midvale, Utah. The presently applicable issues in the case are as follows:

1. To determine the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposed operations of the applicants and the availability of other primary service to such areas and populations.

2. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine in the event it is decided pursuant to the foregoing issue that the objectives of Section 307(b) would be better served by authorizing a service to the community of Midvale, Utah, whether a waiver of Sections 73.1125 and 73.1130 is warranted with respect to the application of Public Service Broadcasting of West Jordan, Inc.[1]

4. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative, basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.[2]

2. A prehearing conference was held on September 23, 1982, and hearings were held on January 11 and 12, 1983. The record was closed by order released April 21, 1983 (FCC 83M-1329). Proposed findings of fact and conclusions of law were filed on April 18, 1983 and reply findings were filed on May 13, 1983.

Findings of Fact

Section 307(b) Issue

3. *Engineering Considerations.* Public Service proposes West Jordan, Utah as its community of license; Faber's application specifies Midvale, Utah. The applicants agree that there are no material distinctions between them as to the areas and populations each proposes to serve. There are five or more aural services available to the respective proposed service areas during both day and nighttime hours (Joint Ex. 1).

4. West Jordan and Midvale are adjacent communities separated by the Jordan River. Both are located about eight miles from the downtown area of Salt Lake City and both fall within the Salt Lake City-Ogden SMSA. Public Service's studio would be located in West Jordan, Faber's in Midvale. Since there is an existing AM station in West Jordan and Midvale has no local broadcast outlet, there exists a presumption, albeit rebuttable, in favor of Midvale under the designated Section 307(b) issue. To offset this, Public Service contends, and it is hereby found, that its proposed facility would place a predicted 70 dBu (3.16 mV/m) signal over Midvale as well as West Jordan, its proposed community of license (Public Service Ex. 9).[3]

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[1] Issue added by order of the presiding officer (FCC 83M-188, released January 17, 1983).

[2] In the order of designation a financial issue was specified against Public Service; and financial and air hazard issues were specified against Faber. These were resolved by summary decisions in favor of the party against whom the issues were specified (FCC 82M-3278, released October 21, 1982; FCC 82M-2977, released September 27, 1982; FCC 82M-3265, released October 20, 1982; see also FCC 83M-2808, released August 19, 1983).

[3] In view of its coverage of Midvale, Public Service urges that the studio location (Section 73.1125) and program origination (Section 73.1130) rules be waived so it may be considered as a Midvale applicant if that community is preferred under Section 307(b). This contention is dealt with elsewhere.

5. *West Jordan.*[4] West Jordan, Utah is a community of 27,192 persons located in northeastern Utah within Salt Lake County. It has a council/manager form of government, with five elected council members and a full-time city manager who serves as the community's chief administrative official. The council meets three times each month and is empowered with legislative authority pursuant to Title 10 of the Utah Code.

6. West Jordan has a Department of Public Safety which includes a full-time police department and fire department. The police department staff consists of 43 full-time employees, and the fire department is comprised of 5 full-time specialists, volunteers and a rescue squad. The community has a branch of the Salt Lake County Public Library System located within its city limits, as well as seven elementary schools with a combined enrollment of 5,100 students; West Jordan Middle School which includes grades 6 through 8 and has a student enrollment of 1,304; and West Jordan High School which has a student enrollment of 1,484.

7. In 1960 West Jordan's population was 3,009 persons, which increased to 4,221 persons by 1970. As indicated above, its 1980 population was 27,192. In large part, this increase resulted from the city's annexation of nearby unincorporated areas of Salt Lake County which had occurred in the interim (Tr. 175-176). Seven percent of West Jordan's population consists of persons of Spanish origin, and an additional 1.6% of the population is comprised of other minorities. The median age of the community is 19 years, with 48.7% of the population being under 18 years of age and 1.9% of the population being 65 and over.

8. The 1980 assessed value of all property in West Jordan was $87,000,000. As of November 30, 1982 West Jordan had issued business licenses to 583 businesses within the city limits. Gross taxable retail sales in West Jordan for the second quarter of 1982 amounted to $36,956,173, an increase of $9,252,567 (33%) over the second quarter of 1981.

9. AM station KZZI, owned and operated by Western Broadcasting, Inc., is licensed to West Jordan. It operates on 1510 kHz, during daytime hours, with an effective radiated power of 10 kW.

10. *Midvale, Utah.*[5] Midvale, Utah is an incorporated city of 10,146 persons located in the middle of the Salt Lake Valley, in Salt Lake County. The city was formally incorporated under its present name in 1909. It is governed by an elected mayor and a five-person city council, who serve on a part-time basis. The day-to-day affairs of the city are handled by a city administrator. In addition, the city has a full-time City Court and Police Department, and has its own water supply and sewage treatment plants, run by its Water and Sewer Department. Its employees also staff its

[4] Except where otherwise indicated, information pertaining to West Jordan is contained in Public Service Ex. 7.

[5] Information pertaining to Midvale is contained in Faber Ex. 1.

Departments of Planning, Building Inspection, Public Works, Finance, Parks and Engineering, and operate a Senior Citizens Center. The Midvale volunteer fire department also operates a local ambulance service.

11. The median age of the Midvale population is 25 years, with approximately 34% being below age 18 and 9% being above age 65. Midvale is largely Caucasian, with the largest minority (about 12%) being Hispanic, although there has been a recent influx of Hmong (Laotian) families.

12. Separate chapters or branches of various social, fraternal and civic organizations have been established in Midvale, including the Midvale Chamber of Commerce, Historical Society, Lions Club, Rotary, Moose, Kiwanis, Community Womens Association, Masons, Elks and Ladies Guild. Active youth groups include Cub Scouts, Boy Scouts, Explorers, Brownies, Girl Scouts and Campfire Girls. The city has its own art gallery and four city parks.

13. During the last three years, Midvale developed and has begun to implement a Master Development Plan to revitalize its aging downtown business district and to promote new business within its borders, expanding its commercial tax base while maintaining the advantages of the city to its residents. In September 1982, at the Utah League of Cities and Towns annual convention, the Governor of Utah presented Midvale with a Community Progress award which recognized the progress Midvale has achieved in implementing its Master Plan, and the accomplishments reflected in its economic development, revitalization and community spirit.

14. Midvale presently has no operating or authorized local broadcast outlet.

The Applicants

15. *Public Service.* Public Service is a corporation with the following officers, directors and shareholders:

Name	*Position*	*Ownership*
Bruce Briggs	President/Director	30%
Scott E. Putnam	Secretary Director	20%
Patricia Griffith	Vice president/Director	20%
Martin Menousek	–	20%
Robert Immitt	Treasurer/Director	10%

16. Briggs would serve as the station's full-time general manager, Putnam would serve as its full-time program director, Griffith would be its full-time news and public affairs director, Menousek would be its full-time advertising/sales manager, and Immitt would work at the station part time (20 hours per week) as the station's business manager. None of

the Public Service principals has any interest in any medium of mass communications (Public Service Exs. 1-5).

17. Bruce Briggs was marketing director of station KSVN, Ogden, Utah, from January 1979 to April 1982. In April 1982, he became station manager and marketing director of stations KTLE AM/FM, Tooele, Utah. He resides in Salt Lake City, within Public Service's proposed service area, and is a member of the John C. Fremont Elementary School PTA (Public Service Ex. 1).

18. Scott Putnam was employed as an announcer at KEVA, Evanston, Wyoming, from May 1977 to October 1977; as an automation programmer and announcer at KVOG, Ogden, Utah, from October 1977 to May 1978; and as an announcer, salesman and engineer at KSVN, Ogden, Utah, from October 1979 to July 1981. He has been employed as an accountant at Halliburton Services, Evanston, Wyoming, since October 1981, but intends to move to the West Jordan area in the event of a grant to Public Service (Tr. 127). He has been affiliated with the Utah State DeMolay Association, the Free and Accepted Masons of Utah, the Ogden Area Jaycees, and the KKEY Club Service Organization, and has been chairman of the 97th district of the national Republican Party, State of Utah (Public Service Ex. 2).

19. Patricia Griffith has been employed at a number of broadcast stations in Utah over the past few years. She worked at station KDYL, Tooele, as a part-time sports reporter between November 1979 and May 1980. During this period, beginning in February 1980, she also worked part-time at station KSXX, Sandy, as a receptionist and producer. In May 1980, she became a part-time newsperson at KDYL, while continuing to work part time at KSXX. She terminated employment at KSXX in August 1980, and at KDYL in September 1980. Since then she has been employed for brief periods at various stations (including KSXX and KDYL) in the Salt Lake City area. She resides in Salt Lake City within Public Service's proposed service area (Public Service Ex. 3; Tr. 132-133).

20. Martin Menousek has worked as an announcer, salesperson and sports director at station KSWI, Clarinda, Iowa (May 1978-September 1978); announcer and production manager/sales manager/sports director at station KHOL, Beulah, North Dakota (October 1978-August 1980); and announcer, salesperson and promotions director at station KSVN, Ogden, Utah (September 1980-September 1981). Since September 1981, he has been employed by Aeromatics Industries, Inc. as a regional sales manager. Menousek currently resides in West Jordan. While in Ogden, he was a member of the Ogden Jaycees (Public Service Ex. 4; Tr. 137-139).

21. Robert Immitt is presently employed as administrator of Family Health Care, Inc., a Utah nonprofit corporation which provides health care services in Tooele County, Utah. He would continue to hold this position

when working part time at Public Service's proposed station during evenings, weekends and on the one-half day off which he receives from Family Health Care, Inc. As Public Service's business manager, Immitt will be involved in the handling of financial matters at the station (Tr. 154, 156). In connection with his present job, Immitt has been a member of several organizations relating to health issues, including the advisory council of the Utah Rural Health Network (where he is chairman), the Utah/Nevada Clinic Administrator's Association, the Tooele-Salt Lake County Vitro Tailings Task Force, the Tooele County Human Services Advisory Board, the Tooele County Human Resources Council (chairman 1978-1980), the Tooele County Council on Aging, and the Task Force on Unification of Social Services in Tooele County (chairman 1977-1979). In 1980-1981, he also was president of the Tooele County Chamber of Commerce and chairman of the Tooele County Landmark Day/County Fair Board. Over the past six years, he has resided in Salt Lake City or in Tooele, Utah, within the service area proposed by Public Service (Public Service Ex. 5; Tr. 147, 157).

22. Public Service proposes to install a standby generator to provide emergency power.

23. *Faber.* Walter P. Faber, Jr., an individual applicant to construct a station serving Midvale, will work at his station on a full-time (at least 40 hours per week) basis, directing the overall operation of the station, including its programming, sales and promotional activities. He has no interest in or connection with any broadcast station, or with any other medium of mass communications (Faber Ex. 2, p. 3; Tr. 191-192, 225-226).

24. Faber was born November 5, 1929 in Wellington, Utah, and has resided within the service area of his proposed station for virtually his entire life. He presently resides in an unincorporated area of Salt Lake County approximately four miles to the northeast of Midvale (Faber Ex. 2, pp. 1-3).

25. Faber has been in the practice of law since 1963, and is currently managing partner of the law firm, Watkins & Faber. In 1979 he fell from the roof of his home and was permanently injured, so that he is now confined to a wheelchair. As a result, he found it desirable to curtail his legal practice and became actively interested in broadcasting as an alternative career. Accordingly, he intends to adjust his professional commitments at Watkins & Faber as may be necessary so as to devote at least 40 hours per week to the management of his station (Faber Ex. 2, pp. 1-3; Tr. 199-200, 226-231).

26. Prior to his injury, Faber taught history and composition to high school students on a voluntary basis and had addressed a number of groups concerning taxation, legal planning and the construction industry (in which he had been employed before becoming an attorney). He has also

done voluntary legal work relating to highway construction and the formulation of procedural rules for the Utah Public Service Commission. In addition, Faber served on a committee in the local School District dealing with construction and access for the handicapped (Faber Ex. 2, pp. 2-3).

27. Public Service contends that Faber will be unlikely to devote 40 hours per week to his proposed station notwithstanding representations at the hearing that he would do so. This commitment, Public Service alleges, is not realistic because of his physical condition (para. 25, *supra*) and because he does not propose to sever all ties with his law firm. These contentions are not persuasive; the record contains ample evidence that Faber's integration proposal is sincere and feasible.

28. Prior to his accident, Faber worked 60-70 hours per week at his law practice (Tr. 200). This practice concentrated primarily on real property and general business law with some litigation. It involved on-site inspection of properties and buildings, travel outside the State of Utah, and appearances in courts within the State (Faber Ex. 2, p. 1; Tr. 191, 228). He also served as managing partner of his firm (Faber Ex. 2, p. 1; Tr. 180-181). After his accident, Faber reduced the average number of hours he regularly devoted to his practice to between 40 and 50 hours per week because his reduced mobility limited his ability to travel, inspect property and appear in court (Tr. 181-182, 191, 227). However, he has worked on evenings and weekends, as well as using those times to read or engage in his hobby of woodworking which may involve 20 or more hours per week (Tr. 182, 185, 196, 228). He has no other business or other interests which make significant demands on his time (Tr. 183-189, 196, 221).

29. Upon reducing his work hours, Faber found that he could maintain his practice without the detailed personal input and supervision which he previously had believed was necessary. He has delegated more work and responsibility to the three other attorneys working on matters affecting his clients, has them attend meetings with clients in his stead, and monitors them less extensively overall (Tr. 182, 187, 203, 207-208, 229). Indeed, at this point, the bulk of such work is presently being done by others in the firm, so that he does not have to go to his office every day (Tr. 198, 233). In similar fashion, his secretary of 11 years handles most of the routine administrative matters of the firm, so that he currently spends, at most, an hour per day on such duties (Tr. 182-183, 201).

30. After his accident, Faber became interested in giving up his law practice in favor of broadcasting because he believed that it would be an interesting and fulfilling career which would require less mobility than his law practice (Faber Ex. 2, p. 3; Tr. 200, 228, 232). While he will not completely withdraw from his law practice and cut all ties with his firm until his radio station is established and affords him a living, he will cut

down that practice as may be necessary to accommodate his commitment to the station (Faber Ex. 2, p. 3; Tr. 200, 227-230).

31. In short, Faber has testified that he can - and will - devote 40 hours per week to his station after it goes on the air while concomitantly reducing his legal practice to a level which will permit him to do so. His testimony shows that this commitment has been carefully considered with due account taken of his physical condition[6] and the feasibility of reducing his professional activities. On the basis of the record, the presiding officer sees no reason why his integration proposal should not be credited. *Cf. Central Texas Broadcasting Co., Ltd.*, 90 F.C.C. 2d 583, 586 (Rev. Bd. 1982).

32. Like Public Service, Faber will have emergency generating equipment to provide continuous operation in the event of a power failure.

Conclusions

The 307(b) Issue

1. Section 307(b) of the Communications Act, as amended, requires the Commission to allocate broadcast facilities so as to provide a "fair, efficient, and equitable distribution of radio service" among the "several States and communities" (47 U.S.C. § 307(b)). Where two or more applicants have applied to operate on a single frequency but have specified different communities of license, this mandate in turn requires the Commission to determine the relative need of each applicant's proposed service area for a new reception service and the relative need of each applicant's proposed community of license for a new transmission service. *WHW Enterprises, Inc.*, 89 F.C.C. 2d 799 (Rev. Bd. 1982); *Kent-Ravenna Broadcasting Co.*, 22 P&F RR 605 (1961).

2. In this case the respective reception services proposed by the applicants are of no decisional significance since there is an abundance of reception services presently available throughout the areas each would serve. In addition the applicants have stipulated that there is no material difference between them in terms of the areas and populations that would be served by their respective proposals. Resolution of the Section 307(b) issue therefore turns on whether the two communities in question, West Jordan and Midvale, have distinct and differing needs for a new transmission service, and, if so, which has the greater need for the service proposed.

3. It is clear that Midvale and West Jordan are distinct communities, with separate local governments and governmental services; separate civic, social and fraternal organizations; separate business centers; and similar indicia of their individual character. Midvale's separate status and

[6] From his demeanor at the hearing, it would appear that, notwithstanding his physical handicap, Faber is a man of considerable energy and vitality.

distinct identity are also reflected in the award it recently received from the Utah League of Cities which recognized Midvale's individual economic and civic efforts over the past three years. In these circumstances, that Midvale and West Jordan may be in geographical proximity does not obviate the distinction between them for Section 307(b) purposes. *WHW Enterprises, Inc., supra,* at 810-811.

4. It is also clear that Midvale is the community to be preferred under Section 307(b) because it presently has no local transmission service, whereas West Jordan already has an existing local outlet. *Pasadena Broadcasting Co.* v. *FCC,* 555 F.2d 1046, 40 P&F RR 2d 1003 (D.C. Cir. 1977); *Radio Greenbrier, Inc.,* 80 F.C.C. 2d 107, 46 P&F RR 2d 1467 (1980). This is so notwithstanding other factors such as West Jordan's greater current population.[7] *Bie Broadcasting Co.,* 81 F.C.C. 2d 1, 26-28 (Rev. Bd. 1980); *Service Broadcasting Corp.,* 36 F.C.C. 1085 (Rev. Bd. 1964). *Cf. Robert J. Reverman,* 78 F.C.C. 2d 1110 (1980). In short the record provides no reason for not applying the strong Section 307(b) presumption favoring the establishment of first local outlets for communities of appreciable size. Midvale's need for such a facility is clear and must therefore be considered paramount to West Jordan's need for a second local service.[8]

Reciprocal Service Issue

5. At the request of Public Service an issue was added to determine whether, if Midvale was found to be the preferred community under Section 307(b), a waiver of the main studio and program origination rules (Sections 73.1125 and 73.1130) would be warranted with respect to Public Service. The basis for this issue is found in *Kent-Ravenna Broadcasting Co., supra,* at 612, in which the Commission stated that where an applicant proposing one community of license met the engineering standards applicable to another community and the latter is preferred under Section 307(b), the applicant may be given comparative consideration for the preferred community if it requests and obtains a waiver of

[7] As stated in the findings, West Jordan's population is 27,192; Midvale's 10,146.

[8] Public Service requests (Proposed Findings, p. 4) that official notice be taken of the program format of the existing West Jordan station, stating that the station "broadcasts a Spanish language format." No source, official or otherwise, is referred to in the request, nor is there any indication whether the programming is exclusively or only partially in the Spanish language. For these reasons official notice is deemed inappropriate; if the programming was believed to be material to the issues, a proffer of evidence should have been made at the hearing. In any event, formats, unlike station assignments, may be altered at the discretion of the licensee; from an allocations standpoint the overriding consideration is that the Commission has authorized a first local outlet for West Jordan, but none has yet been assigned to Midvale.

certain non-engineering requirements (e.g., studio location) which are intended to link a proposal to the specified community of license.

6. Though the reciprocal service concept has been referred to in several recent cases,[9] the presiding officer knows of no case where it has been relied on in making a grant. As he understands its applicability to this case, Public Service, which places the required signal over the preferred community of Midvale, could be considered comparatively with Faber, the Midvale applicant, if it demonstrates that the public interest would be served by a waiver of the studio location and program origination requirements, thus permitting Public Service's studio and primary program origination point to be located in West Jordan as proposed.[10]

7. The record in this case provides no basis for waving these requirements. While it may be assumed that a studio in West Jordan would not be geographically distant from Midvale, the communities being separated only by a river, there is no evidence as to actual accessibility, particularly by public transportation. As to programming, Public Service has proposed to produce programming which will help meet the problems which generally affect several communities surrounding West Jordan, including but not limited to Midvale. This, however, is what any licensee is expected to do; it provides no basis for waiving the program origination requirement of Section 73.1130. See *Affinity Communications, Inc.*, FCC 83D-58, released October 20, 1983 (ALJ).

8. Section 307(b) of the Act and the judicial and Commission precedent developed thereunder presume that each community has its own particular local needs and interests which are best served by its own local outlet. Public Service will not locate its main studio in Midvale and its proposal to serve the general needs of Midvale along with those of other surrounding communities simply cannot be equated with the locally oriented studio location and program origination aspects of Faber's proposal for Midvale, his designated community of license. Having found that the public interest warrants the establishment of a first local service to Midvale, it makes little sense to waive rules which provide an important nexus between the community and the proposed station when another qualified applicant can be selected who is in full compliance with those rules. In the circumstances of this case, a waiver would simply provide a "safety net" for Public Service, permitting its application to be considered for the preferred community even though it has applied for a different locality. While this may serve the applicant's private interest, clearly the public

[9] *WHW Enterprises, Inc.*, 89 F.C.C. 2d 799, 811 (Rev. Bd. 1982); *Radio Greenbrier, Inc.*, 80 F.C.C. 2d 107, 115-117 (Rev. Bd. 1980).

[10] A different view of the reciprocal service concept is set forth by Faber in its Proposed Findings, pp. 23-27, and Reply Findings, pp. 9-10.

interest would be better served by the selection of a wholly authentic Midvale applicant. Accordingly, it is concluded that Public Service is not entitled to a waiver of Sections 73.1125 and 73.1130.

9. Summarizing the foregoing conclusions, it has been held (1) that Midvale's need for a first local outlet is clearly greater than West Jordan's need for a second station; and (2) that Public Service, the West Jordan applicant, is not entitled to a waiver of the studio location and program origination rules, and thus cannot be transmuted into an applicant for Midvale. Therefore, pursuant to Section 307(b) of the Act and Commission policy set forth in the cases cited above, as well as many others, a grant must be made to Faber, the applicant proposing Midvale as its city of license.

Contingent Comparative Issue

10. Notwithstanding the conclusions previously reached that Section 307(b) considerations are dispositive and that a comparison of the Public Service and Faber proposals is unnecessary, the comparative issue will be briefly addressed.

11. Neither applicant has interests in any medium of mass communications, and both propose to have standby emergency power available. Hence, resolution of the comparative issue depends on which of these applicants will offer the "best practicable service" to the public, which determination in turn depends essentially on which of the applicants has the stronger proposal for integration of its ownership into the daily management of the station.

12. Faber offers the Commission 100% full-time integration of ownership into the management of his station, while Public Service proposes 90% full time and 10% part time. Faber's integration is enhanced by his lifetime residence in his station's service area. The Public Service proposal is enhanced by the broadcast experience of four of its principals; and all of them are or would become local residents. Finally, some enhancement credit is warranted for the ownership interest (20%) and management participation of a woman, Ms. Griffith.[11]

13. Qualitatively speaking, therefore, the applicants are equal with respect to local ownership. Public Service has greater broadcast experience and benefits from its female ownership. It is concluded that Public Service has established some margin of superiority in these areas of comparison. Whether this is sufficient to overcome Faber's slight quanti-

[11] The civic participation of the applicants is difficult to assess and seems of little consequence as a decisional factor. Faber and three Public Service principals show some record of civic participation in the Salt Lake City area but none of it relates to the communities of West Jordan or Midvale. A preference to either applicant seems unwarranted.

tative superiority is a judgment that necessarily involves hair-splitting. In the presiding officer's view, Public Service's qualitative preferences are sufficient to offset Faber's quantitative superiority, and would probably justify a slight overall preference for Public Service for integration of ownership with management.

14. The comparative issue in this case provides that if a "choice between the applicants should not be based *solely* on considerations relating to Section 307(b)" (emphasis added), the applications should be considered on a comparative basis to determine which proposal would better serve the public interest. It has been concluded that Section 307(b) considerations are dispositive, and that on those grounds a grant should be made to Faber. But if Section 307(b) considerations were not to be considered "solely" dispositive, their comparative significance could not be ignored.[12] As the discussion in the preceding paragraphs demonstrate, the applicants are in virtual parity in terms of diversification and integration. Their most clear distinguishing characteristic is that Faber, but not Public Service, would be licensed to a community which has no local station, would locate his studio in that community, and would originate from there the bulk of his programming. This difference, even if not dispositive of the case, would justify a clear preference for Faber and would be sufficient to overcome any small preference awarded to Public Service under integration of ownership with management, thus resulting in his selection under the comparative issue.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Walter P. Faber, Jr. IS GRANTED and the application of Public Service Broadcasting of West Jordan, Inc. IS DENIED.[13]

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

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[12] Such consideration is clearly not ruled out by the plain language of the issue quoted above and is not at all unprecedented. See *Jefferson Standard Broadcasting Co.*, 33 F.C.C. 471 (1962), where the Commission found Section 307(b) considerations to be "applicable but not controlling" (p. 487) and weighed them in the context of the comparative issue. Similarly, the comparative coverage issue frequently specified in purely comparative cases rests on considerations related to Section 307(b).

[13] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Common Carrier, Definition
Common Carrier, Interconnection
Common Carrier, Maximum Separation Rules
Common Carrier, Rates, Charges

Notice of Proposed Rulemaking adopted to treat special activities as non-common carrier offerings.
—Tariff/Facilities Authorization
CC Docket No. 84-369

FCC 84-146

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Special Construction of Lines and Special Service Arrangements Provided by Common Carriers	CC Docket No. 84-369

Notice of Proposed Rulemaking

Adopted: April 11, 1984; Released: April 30, 1984

BY THE COMMISSION:

I. *Introduction*

1. Special construction of lines may be provided by common carriers for individual customers under the tariff and facilities-authorization procedures of Title II of the Communications Act of 1934.[1] Typically,

[1] In AT&T: Terrestrial Television Transmission Service, 88 FCC 2d 1656, 1665 (1982), we concluded that the provision of interexchange channels for television transmission is not special construction:

> [These channels] are not specially designed or built and are presumably provided in exactly the same way for all customers. AT&T incurs no special costs and constructs no special facilities. Rather, the facility is fungible, and if a long term customer ceases to use it the facility would become available to serve other long term or occasional customers. It is unreasonable, therefore, to attribute to any one customer costs which are necessary to the provision of a general offering. [Interexchange channels] should be provided as ordinary tariffed facilities . . . . Even if AT&T found it necessary to construct new facilities or shift existing facilities, the new customer should not be liable to pay an additional charge. The general tariff rate includes investment necessary to provide the service, and a customer should not be liable to pay extra charges because it happens that new facilities would be needed for the provision of ordinary service.

these lines are individually tailored, constructed, and priced in response to a customer's request where existing lines or ordinary tariffed facilities would not satisfy that request. For example, American Telephone and Telegraph Co. (AT&T) filed Tariff FCC No. 262 which states that it is applicable when one or more of the following conditions exist:

> a. The channel facilities to provide services or channels are not available and, at the request of the customer, the [carrier] constructs facilities to provide the services or channels for the customers and there is no other requirement for the facilities so constructed.
>
> b. At the request of the customer, the [carrier] constructs channel facilities of a type other than that which the [carrier] would otherwise utilize in order to provide services or channels for the customer.
>
> c. In order to comply with requirements specified by the customer, construction by the [carrier] involves a routing of facilities other than that which the [carrier] would normally utilize in order to provide services or channels for the customer.
>
> d. At the request of the customer, the [carrier] constructs a greater quantity of channel facilities than that which the [carrier] would otherwise construct in order to fulfill the customer's initial requirements for services or channels.
>
> e. The channel facilities to provide services or channels are not available and, at the request of the customer, the [carrier] expedites construction of the facilities at greater expense than would otherwise be incurred.
>
> f. The channel facilities to provide services on channels are not available and, at the request of the customer, the [carrier] constructs temporary facilities to provide services or channels for the period during which the permanent facilities are under construction.[2]

Most special construction under this tariff involves lines for television transmission.

See also AT&T: Group/Supergroup Facilities, Mimeo No. 4821 at 7 n. 8 (released June 20, 1983) (special construction of local distribution channels might be necessary to provide group and supergroup services to other carriers and customers).

[2] AT&T Tariff FCC No. 262, Section 2.1 (effective August 24, 1982). AT&T filed individual special construction charges in this tariff on behalf of itself and its connecting and concurring carriers. Tariffs filed with provisions similar to those in AT&T Tariff FCC No. 262, but in each case unique in the definition of and terms for special construction, include AT&T Tariff FCC No. 5, Section 2.2 (issued October 3, 1983), Exchange Carrier Association Tariff FCC No. 3, Section 2.6.2 (issued September 30, 1983), Exchange Carrier Association Tariff FCC No. 1, Section 11 (Special Facilities Routing of Access Services) (issued September 30, 1983), and Pacific Northwest Bell Telephone Co. Tariff FCC No. 6, Section 2.6.2 (issued September 26, 1983). AT&T Tariff FCC No. 5, Exchange Carrier Association Tariff FCC Nos. 1 and 3, and Pacific Northwest Bell Telephone Co. Tariff FCC No. 6 were suspended and are subject to an investigation. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Order FCC 83-470 (released October 19, 1983), Order FCC 84-51, at 11-2/12-2, SC-1 to SC-19 (released February 17, 1984). *See also* Special Permission No. 84-112 (March 6, 1984) (provision of Specialized Facilities by The Chesapeake and Potomac Telephone Companies to MCI Telecommunications Corp.).

2. Under this tariff, when special construction is to provide services or channels for less than one month, a single charge applies "equal to the cost installed of the specially constructed facilities, less net salvage."[3] Examination of the tariff reveals that in 1983 there were several hundred new special construction projects of less than one month; the average nonrecurring charge was roughly $1,000 per project. When special construction is to provide services or channels for one month or more, this tariff applies a maximum termination liability, expediting charge, nonrecurring charge, and/or recurring monthly charge, depending on the type of special construction. All charges and liabilities are developed on an individual case basis; the tariff states that an offering's terms are based on its estimated installation costs.[4] Examination of the tariff also shows that in 1983 there were 92 new special construction projects of one month or more; 90 involved maximum termination liabilities and 3 involved expediting charges (one project had both types of charges). The total maximum termination liabilities (estimated installation costs) of these projects were $2,254,820, averaging about $25,000 per project and with only 4 projects over $100,000. (All were less than $640,000.) The expediting charges for the 3 projects were $88,328 in total. Much of the costs of special construction projects of one month or more is not recovered from termination liabilities. Rather, it is bundled into the rates for private line services and other transmission services.[5]

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[3] *Id.* at Section 2.2.b.(1).

[4] AT&T Tariff FCC No. 262, Section 2.2.a. *See also* Exchange Carrier Association Tariff FCC No. 3, Section 2.6.3. In AT&T and Western Union Private Line Cases, 34 FCC 244, 363-68 (1961), the Commission determined that AT&T's tariff for special construction should not merely provide a general description of how the carrier may determine charges for the service and a statement that charges will be based on cost. While recognizing the problems of a rate schedule for special, tailor-made construction, the Commission concluded that

> In the case of large communications systems having their own peculiar characteristics and a limited number of customers, rates based on average costs for such a system would appear to be feasible even though in fact limited in applicability. On the other hand, in the case of a type of construction involving numerous "one shot" temporary facilities, it appears that rates based on average costs for this type of construction could be devised, perhaps on an "equipment component" basis.

Id. at 368.

[5] For example, the maximum termination liability payable by Rockwell International for construction of facilities between the carrier's central office and the customer premises in Pittsburgh, Pa., is $174.010. Rockwell International would have to pay this amount if it discontinued service within one month after the facilities were placed in service. But, if Rockwell International continued service for ten years, it would have to pay no charges for special construction, only the tariffed rates for service. In that case, the costs of special construction are bundled into the rates for a common carrier service and averaged over all customers of that service and, perhaps, other services. *Id.* at Section 2.2.a.(1),

3. In addition to special construction of lines, special service arrangements may be provided by common carriers for individual customers under the tariff and facilities-authorization procedures of Title II. Typically, these services are individually tailored and priced in response to a customer's request where ordinary tariffed (generally offered) services would not satisfy that request. For example, AT&T's Tariff FCC No. 258 states that it is applicable to "interstate private line services, channels or equipment as specified herein for use on private line services for miscellaneous or experimental purposes of a unique or evolutionary nature."[6] It is unclear what customer requests qualify as "miscellaneous or experimental purposes of a unique or evolutionary nature." This tariff states that all charges are determined on an individual case basis. The tariff supplies no rules for developing rates or dividing costs between monthly, installation, and termination charges. AT&T's current Tariff FCC No. 258 contains on behalf of AT&T and its connecting and concurring carriers about a dozen special service arrangements.[7]

4. This proceeding seeks to modify our traditional common-carrier treatment of special construction of lines and special service arrangements (collectively referred to as special activities). Specifically, we propose to (1) use the Commission's complaint process to resolve disputes about whether an offering is a special activity (non-common carrier service) or an indifferent holding out to the public (common carrier service); (2) grant carriers blanket Section 214 authorization for special activities, to the extent that such authorization is necessary; (3) require

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page 28.2. Generally, "when special construction of channel facilities is involved, the provisions of [Tariff FCC No. 262] apply in addition to those set forth in the tariffs under which the service ordered is offered." *Id.* at Section 2.

[6] AT&T Tariff FCC No. 258, Section 1. AT&T Tariff FCC No. 260 contains AT&T's generally-less-specialized private line offerings. Tariffs filed with provisions similar to those in AT&T Tariff FCC No. 258, but in each case unique in the definition of and terms for special service arrangements, include Exchange Carrier Association Tariff FCC No. 1, Sections 10-12 (issued September 30, 1983), and AT&T Tariff FCC No. 3, Sections 16-17 (issued October 3, 1983). Exchange Carrier Association Tariff FCC No. 1 and AT&T Tariff FCC No. 3 were suspended and are subject to an investigation. Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Order FCC 83-470 (released October 19, 1983), Order FCC 84-51, at 11-2/12-2, SC-1 to SC-19 (released February 17, 1984).

[7] As an example of a service offered under AT&T's Tariff FCC No. 258, AT&T provides a radio remoting service to an agency of the United States Government between seven pairs of points; the service includes (a) one Beacon Video Channel of about 2.5 MHz bandwidth, including the Beacon Trigger function, (b) one Radio Normal Video and Gated Moving Target Indicator Channel of about 3 MHz bandwidth, including the Radio System Trigger function, and (c) one Angle Mark Channel of approximately 20 MHz bandwidth. *Id.* at 7. Another special service arrangement is described as "miscellaneous private line services furnished to provide for the transmission of sequential synchronous digital data signals at a rate of approximately 230,400 bits per second." *Id.* at 14.

carriers not to file future special activities in their tariffs, and instead to file semi-annual reports listing the projects for such activities; (4) keep the costs of special activities on books of account separate from those used to calculate the revenue requirement of generally-available, indiscriminately-supplied, common carrier service offerings, perhaps with separate subsidiaries required for AT&T and the Bell Operating Companies; (5) require carriers to interconnect on reasonable, nondiscriminatory terms with suppliers of special activities; and (6) use private radio spectrum for those special construction offerings requiring use of radio frequencies. We will incorporate the comments filed in response to the Notice of Inquiry in *Long-Run Regulation of AT&T's Basic, Domestic, Interstate Services*[8] in this proceeding to the extent that they are relevant.

II. *No Legal Compulsion to Offer Special Activities to the Public Indifferently*

5. In *National Association of Regulatory Utility Commissioners vs. FCC*, 525 F.2d 630, 642 (D.C. Cir.), *cert. denied*, 425 U.S. 999 (1976) (*NARUC I*), the court identified two criteria determinative of whether a service may be provided on a non-common carrier basis: (1) whether there is or should be any "legal compulsion" to serve the public indifferently; and (2) if not, whether there are reasons implicit "in the nature" of the service "to expect an indifferent holding out to the eligible user public."[9] Regarding "legal compulsion," the court found that Specialized Mobile Radio Systems were not compelled by the Commission to serve any particular applicant and had unlimited discretion in determining whom, and on what terms, to serve. In *Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238, 1248-55 (1982), *appeal pending sub nom. Wold Communications v. FCC*, D.C. Cir. No. 82-2054 (filed September 10, 1982), we found no "legal compulsion" to provide transponder sales on a common carrier basis under the Communications Act's goal of making available to the public, so far as possible, efficient, reasonably-priced telecommunications services, 47 U.S.C. § 151, or under our regulatory policies. We concluded that permitting offerings of transponder sales on a non-common carrier basis would promote our policies of efficient spectrum usage and competition. This section presents the basis for our tentative finding that there is no "legal compulsion" for a carrier to provide special activities to the public indifferently under the Communications Act or our regulatory policies. The next section discusses the nature of special activities. Together the analysis of these sections supports our

[8] CC Docket No. 83-1147, 48 Fed. Reg. 51340, 51348 (November 8, 1983).

[9] *See also* FCC v. Midwest Video, 440 U.S. 689, 701 (1979); Competitive Carrier Rulemaking, 84 FCC 2d 445, 520-34 (1981).

proposal to require special activities to be provided on a non-common carrier basis.

6. Our analysis of public interest considerations starts with the statutory provisions of the Communications Act. Generally, the customer benefits in using a common carrier service from the requirements that a carrier must (1) furnish such service upon reasonable request, and (2) charge just, reasonable, and nondiscriminatory rates for the service.[10] In most, if not all, cases of special construction of lines and special service arrangements, it does not appear that customers benefit from imposition of these requirements. We will look to the comments in this proceeding to develop a record on these issues.

7. Regarding the assurance of service on demand inherent in common carrier offerings, it appears that customers may readily obtain special construction of lines from numerous alternative suppliers through private contracts. A wide range of telephone common carriers, specialized and miscellaneous common carriers, and domestic satellite carriers have sources of equipment and expertise in building lines similar to those often requested for special construction. Suppliers of private microwave systems, private cable systems, or satellite earth stations also could meet many customers' demands for special construction. Further, since most special construction involves video or other private lines, requiring that special construction be offered on a non-common carrier basis would not endanger the widespread availability of telephone service to customers of special construction. *See* para. 20 *infra.*

8. A related question involves the effects of requiring non-common carrier status for special activities on common carrier customers. The Communications Act seeks to promote the widespread availability of telephone service at reasonable rates. While we do not want to encourage "uneconomic bypass," *MTS and WATS Market Structure*, 48 Fed. Reg. 42984 (September 21, 1983), *modified*, FCC 84-36 (February 15, 1984), we also do not want to impede *economic* bypass through special activities provided by common carriers. Furthermore, special construction is not necessarily used to bypass telephone exchange facilities. Often special construction provides connections to exchange facilities not otherwise available; these network extensions *increase* usage of network facilities and network capabilities, and may help lower rates to customers of common carrier services. We seek comments on the relationship between regulating special construction as common carrier offerings and bypass, and will adjust our proposal if the record shows that non-common carrier treatment of special activities would impair the efficient use of telecommunications facilities and reasonable rates.

[10] 47 U.S.C. §§ 201-202.

9. The attractiveness to customers of obtaining special construction from suppliers other than the area's franchised telephone carrier (or, possibly, AT&T) often will depend on the existence of reasonable interconnection arrangements to carriers' facilities for customer-provided facilities. The assurance of special activities on demand from multiple suppliers is promoted by our policy in favor of reasonable interconnections. In 1976 we ordered AT&T to "honor customer requests to terminate [private line] services at premises other than those at which the customer has a regular and continuing need to originate and terminate communications unless there are factors present in a particular case which would raise an unreasonable threat to the network."[11] In 1979 and 1983 we ordered AT&T to provide private, high-speed data, and business telephone lines for interconnection with microwave terminals of private systems.[12] Recently, we proposed to require all exchange carriers to provide reasonable terms for interconnection with customer-owned lines in their interstate access tariffs.[13] In Section IV we will return to the question whether additional standards are required to assure reasonable interconnections with special construction and special service arrangements.

10. Application of the common-carrier duty-to-serve requirement to special service arrangements seems to give customers little benefit not otherwise available in the marketplace. Many suppliers are available who can combine existing terrestrial or satellite facilities with the capability to extend or modify them so as to provide special service arrangements. The requirements of reasonable carrier-to-carrier[14] and customer-to-carrier[15] interconnection arrangements, and the ban on resale restrictions[16] reduce the barriers to providing special service arrangements. A supplier can meet a customer's special request by utilizing common carrier services in

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[11] AT&T: Restrictions on Interconnection of Private Line Services, 60 FCC 2d 939, 945 (1976) (*Piece-Out*). The carrier has the burden of showing that a restriction on interconnection is reasonable.

[12] AT&T: Interconnections with Private Interstate Communications Systems, 71 FCC 2d 1 (1979) (ARINC); AT&T: 1.544 Mbps Channels for Connection with Private Interstate Communications Systems, Mimeo No. 636 (released November 8, 1983). *See also* Fort Mill Telephone Co. v. Federal Communications Commission, 719 F.2d 89 (4th Cir. 1983).

[13] MTS and WATS Market Structure (CC Docket No. 78-72, Phase III), FCC 83-178, at 20 (released May 31, 1983).

[14] *See* Bell Tel. Co. of Penn. v. Federal Communications Commission, 503 F.2d 1205 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975); Lincoln Tel. and Tel. Co., 72 FCC 2d 724, 74 FCC 2d 196 (1979), 78 FCC 2d 1219 (1980), *aff'd*, 659 F.2d 365 (D.C. Cir 1981); MCI Telecom. Corp. v. Federal Communications Commission, 561 F.2d 365 (D.C. Cir. 1975), *cert. denied*, 434 U.S. 1040 (1978), 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978).

[15] *See* notes 11-13 *supra*.

[16] Resale and Shared Use, 60 FCC 2d 261 (1976), *aff'd sub nom.* American Tel. and Tel. Co. v. Federal Communications Commission, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 895 (1978); Resale and Shared Use of Domestic Public Switched Network Services, 83 FCC 2d 167 (1980).

conjunction with other facilities which add features to the services or repackage them. Also, customers may be able to utilize private telecommunications systems if common carrier services do not meet their special demands.[17] The record developed in this proceeding may lead us to the same conclusion regarding special service arrangements that we reached in the *Second Computer Inquiry* regarding enhanced services, that the market is "truly competitive."[18]

11. We next turn to whether there are public interest benefits from requiring special activities to be provided as common carrier services with regard to tariff regulation designed to assure just, reasonable, and nondiscriminatory rates. Generally, the Commission has had difficulty in controlling cost allocations and determining the proper revenue requirement of common carrier services.[19] The Commission lacks the resources to delve into the cost justification for each special construction and special service arrangement. Anyway, such analysis may not reveal an unlawful rate because of the leeway afforded to carriers in cost allocations. Instead, much of our rate scrutiny attempts to utilize in-kind comparisons (comparing like rate elements in different services) to identify unlawful rates.[20] Such analysis is almost impossible when dealing with bundled rates for individualized special activities. Thus, requiring special activities to be provided as common carrier services does not guarantee effective rate regulation. Furthermore, as we recognized in the *Second Computer Inquiry* and the *Competitive Carrier Rulemaking*,[21] market forces can

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[17] *See* Domestic Fixed-Satellite Transponder Sales, *supra*, 90 FCC 2d at 1246; Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970); Land Mobile Service, 51 FCC 2d 945 (1975), *aff'd sub nom.* National Association of Regulatory Utility Commissioners, *supra*; Above 890, 27 FCC 359 (1959); General Mobile Radio Service, 13 FCC 1190 (1949).

[18] 77 FCC 2d 384, at 433, *reconsid.*, 84 FCC 2d 50 (1980), *further reconsid.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983).

[19] *See* AT&T: Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384, 397, *reconsid.*, 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunications Corp. v. FCC, 675 F. 2d 408 (D.C. Cir. 1982); Long-run Regulation of AT&T's Basic Domestic Interstate Services, *supra*, 48 Fed. Reg. at 51343.

[20] *Id.* at 51344; AT&T: Private Line Structure and Volume Discount Practices, FCC 84- (adopted April 11, 1984). Tariffs which do not define rate elements clearly and do not show charges for rate elements are of little value in assuring just, reasonable, and nondiscriminatory rates. We recently required the National Exchange Carrier Association to replace its proposal of charges developed on an individual case basis for engineering and administrative services in connection with special activities. Rather, the tariff should show charges for these services Investigation of Access and Divestiture Related Tariffs, Order FCC 84-51, at 11-2/12-2 (released February 17, 1984). Yet, these rate elements are only some of the individualized service functions provided in connection with special activities about which tariffs are, to some extent inherently, vague.

[21] 48 Fed. Reg. 52452 (November 18, 1983) (Fourth Report).

help assure that consumers will receive services at just, reasonable, and nondiscriminatory rates. The proposals in Section IV are designed to strengthen the ability of market forces to check carriers' charges for special activities.

12. We also observe that requiring carriers to provide special activities as common carrier services may impair effective rate regulation of other common carrier services. Many special activities involve bundling the costs of these offerings with rates for other offerings. For example, under the maximum-termination-liability provision in AT&T FCC Tariff No. 262, a customer does not pay special construction costs if he uses a line for ten or more years. The costs of such lines become part of the revenue requirement of the carrier's other services, resulting in possible cross-subsidies and unreasonable rates.[22] Special service arrangements may also involve bundling common carrier services offered under other tariffs with special features, making it difficult for us to determine that the carrier charged the tariffed rate for the common carrier service.[23] In addition, we are concerned about bundling "quotation-preparation" costs for these special activities into the rates for common carrier services.[24]

13. Contrary to our regulatory policies favoring competition, the practice of providing special activities as common carrier services with bundling impairs competition. Suppose that a carrier supplies special lines

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[22] In Communications Satellite Corp.: Hickam Earth Station, 80 FCC 2d 170 (1980), *vacated*, 86 FCC 2d 712 (1981), the carrier proposed to construct two international earth stations and associated facilities to provide direct 1.544 Mbps service to the U.S. Department of Defense. In its 1980 decision, the Commission rejected the carrier's facilities applications in part because the carrier allocated far less than all of the costs of the new facilities to the customer requesting the special activity, an allocation that would unnecessarily burden the carrier's general ratepayers. This decision was vacated; this issue was designated for hearing and it later became moot. In another decision, the Commission accepted the carrier's cost allocation for a special activity, even though the Commission's preferred method was not used, RCA Alaska Communications, Inc.: Revisions of Tariff FCC No. 1, Private Line Switching Service and Operator Service to the U.S. Government, Department of Defense, 67 FCC 2d 1318 (1978).

[23] In AT&T: Satellite-Based Private Data Service Offering, 89 FCC 2d 1116, at 1124 n. 25 (1982), we stated: "We do not reach the merits of [the] contention that the terrestrial link . . . encompassed in [this] offering is sufficiently 'like' AT&T's high speed DDS to raise questions of unlawful price discrimination . . . . We request, however, that AT&T upon resubmitting its tariff explain why the costs attributable to this element are so much lower than the average DDS costs for similar distances."

[24] In many instances, customers require carriers to prepare estimates of charges for special activities. Preparation of these quotations can involve substantial staff work for the carrier. Charges for special construction may cover these costs. But, these costs may be covered by rates for common carrier services if (1) a potential customer does not take the carrier's special activity, (2) a customer exceeds the period for termination liability and does not pay a charge in addition to rates for common carrier services, or (3) the carrier otherwise shifts some quotation-preparation costs into the revenue requirement for common carrier services.

to a customer at no additional charge when the customer uses the carrier's service for ten or more years. This practice makes it difficult for an independent construction company to compete by building lines for the customer and charging for them separately when the customer intends to take the carrier's service for many years. Also, a carrier may bundle construction to provide ordinary tariffed facilities with special construction. This practice impairs regulation of the terms of offering and revenue requirements for ordinary tariffed facilities, and can lessen competition in special construction.

14. Another problem with tariffing special activities is that tariffing may impair private contractual dealings to the detriment of the customer and/or carrier. This can also impede fair competition between carriers and non-carriers in supplying special activities. Tariffs are not fixed over time, and the terms of a tariff cannot be bound or altered by the terms of a private contract between the carrier and a customer.[25] Tariffing subjects the carrier-customer dealing to possible suspension, rejection, investigation into any aspect of the dealing, or prescription of terms and conditions by the Commission.[26] Thus, dealing with a carrier for a special but tariffed activity may be unsatisfactory to a customer who wants either the security of a fixed, long-term contract or the ability to revise the terms of the relationship in light of future developments. In addition, a customer may bring a suit for recovery of damages under the Communications Act in a federal court, and the Commission can direct the carrier to pay the customer damages after hearing on a complaint filed by the customer at the Commission or initiated by the Commission.[27] All of these provisions alter the rights and liabilities that customers and carriers would have in private contractual dealings for non-common carrier services.

15. We found in the *Second Computer Inquiry* that offerings of enhanced services (as defined therein) and new customer-premises equipment are not within the scope of Title II but are within our ancillary jurisdiction. That decision discontinued Title II regulation of these offerings and required that they be unbundled (offered separately) from

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[25] American Broadcasting Companies v. FCC, 643 F.2d 818, 819 (D.C. Cir. 1980) (*ABC*). The courts have referred to a principle called the "filed rate doctrine" which forbids a regulated entity to charge rates for its regulated services other than those properly filed with the appropriate regulatory authority. Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 577 (1981); T.I.M.E. Inc. v. United States, 359 U.S. 464, 473 (1959); City of Cleveland v. FPC, 525 F.2d 845, 854 (D.C. Cir. 1976).

[26] 47 U.S.C. §§ 204-205. *See* MCI Telecom. Corp. v. Federal Communications Commission, 665 F.2d 1300, 1303 (D.C. Cir. 1981) (Commission may modify a contract after an investigation finding it "unjust, unreasonable, unduly discriminatory, or preferential"); Federal Power Commission v. Sierra Pacific Pacific Power Co., 350 U.S. 348, 355 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

[27] 47 U.S.C. §§ 206-209. *See* New York Telephone, 89 FCC 2d 1126 (1982).

basic, common carrier services and provided outside of tariffs. The approach followed in the *Second Computer Inquiry* provides guidance here. Even if there is no "legal compulsion" to provide special activities to the public indifferently, we tentatively conclude that they would fall within our ancillary jurisdiction. That is, we believe that we would have a continuing interest in obtaining information about these special services and establishing certain conditions and terms for their provision.[28] Offerings that are purportedly special activities but which are in fact offered to the public indifferently may provide a carrier with a means to discriminate among its customers.[29] The policies of Title II would require the Commission to scrutinize a carrier's use of offerings by private contract to promote just, reasonable, and nondiscriminatory charges for common carrier services.[30]

III. *Nature of Special Activities*

16. In this section we propose to find that the nature of most offerings of special construction and special service arrangements does not cause us to expect an indifferent holding out to the eligible user public. The essential characteristic of common carriage is "holding oneself out to serve indiscriminately," as opposed to the practice of making "individualized decisions, in particular cases, where and on what terms to deal." *NARUC I, supra,* 525 F.2d at 642. The court in *NARUC I* held that Specialized Mobile Radio Systems do not provide common carriage. Applying the court's analysis to proposals to sell domestic fixed-satellite transponders, the Commission determined that these sales do not constitute common carrier activities and are exempt from the Title II requirements: "Stable, long-term contractual offerings to individual customers of technically and operationally distinct portions of a satellite system fall far short of the indiscriminate holding out contemplated in the *NARUC I*

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[28] The Commission has the authority to require the filing of any contracts of any carrier, 47 U.S.C. § 211.

[29] *ABC, supra,* 643 F.2d at 819.

[30] "No carrier . . . shall engage or participate in [common carrier] communication unless schedules [of its charges, i.e., tariffs] have been filed and published . . . ." 47 U.S.C. § 203(c). In AT&T: Earth Station Services, 42 FCC 2d 654, 659 (1973), we ordered AT&T to provide local loops to satellite carriers by tariff rather than contract to promote nondiscrimination. *See also* Interconnection of Facilities Provided to the International Record Carriers, 66 FCC 2d 517, 525, *aff'd sub nom.* Western Union International v. Federal Communications Commission, 568 F.2d 1012, 1018 (2d Cir. 1977). In the Competitive Carrier Rulemaking, 77 FCC 2d 308 (1979) (Notice), 85 FCC 2d 1 (1980) (First Report), 84 FCC 2d 445 (1981) (Further Notice), 91 FCC 2d 59 (1982) (Second Report), *reconsid.*, 93 FCC 2d 54 (1983), 48 Fed. Reg. 46791 (October 14, 1983) (Third Report), 48 Fed. Reg. 52452 (November 18, 1983) (Fourth Report), we concluded that certain carriers would not be required to file tariffs. Nevertheless, these carriers' common carrier services must be provided at just, reasonable, and nondiscriminatory charges in compliance with 47 U.S.C. §§ 201-202.

decision."[31] The Commission distinguished transponder sales from the prevalent common carrier offerings where many customers are repeatedly requesting the same service and where such individualized dealings are unlikely to occur.[32] In this section we tentatively conclude that special activities do not have the nature of an indifferent holding out to the eligible user public.

17. Even more so than transponder sales, multi-month special construction of lines involves a stable, long-term, custom-tailored, contractual offering to an individual customer, usually of technically and operationally distinct facilities. Pursuant to Special Permission No. 4456, carriers may file special construction offerings on one-day's notice. Where such an offering is shown in tariffs on file with the Commission, the tariffs merely note a private contractual agreement between a carrier and an individual customer.[33] Such tariffs typically do not provide an explicit statement of charges in advance of the offering and a simple and systematic list of situations in which they are applicable.[34] The carrier does not file in its tariff sufficient information to prove to the Commission that the terms and conditions of the offering are just, reasonable, and nondiscriminatory. In at least one way, our rules already treat these special activities differently than common carrier offerings. We require the carrier to transmit to the customer a copy of the explanation and data supporting the rate for special construction, special assembly equipment, and special service arrangements.[35] This carrier-to-individual customer transfer of

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[31] Domestic Fixed-Satellite Transponder Sales, *supra*, 90 FCC 2d at 1257.

[32] *Id.* at 1256-57.

[33] An entry in a tariff such as "construction of facilities from WIVB-TV to WKBW-TV, Buffalo, N.Y." with a maximum termination liability of $2,000, AT&T FCC Tariff No. 262 at 15, provides no information about the type of facilities constructed or the mileage. In a 1976 proceeding on tariff notice periods, Southern Pacific Communications Co. (SPC) "suggested a one-day period of public notice for experimental services if that term is defined so as to refer to customer services or special construction which does not involve a general offering to the public at large. SPC argues that such a minimal period of public notice is appropriate in these circumstances because the charges filed have already been agreed to by the customer and a long period of public notice would only result in unnecessary delay." Amendment of Parts 0, 1, and 61 of the Commission's Rules, 62 FCC 2d 474, 480 (1976).

[34] 47 C.F.R. § 61.55(h). In AT&T Tariff FCC No. 5, filed on October 3, 1983, AT&T proposed to provide special construction only when "the company agrees to construct the plant" (Section 2.2). The tariff does not indicate how AT&T would determine whether to undertake special construction. This tariff is subject to an investigation. *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Order FCC 83-470 (released October 19, 1983); Letter to D. Culkin from Chief, Common Carrier Bureau at 15 (dated January 9, 1984).

[35] 47 C.F.R. § 61.38(e). *See* Amendment of Section 61.38 of the Commission's Rules, 91 FCC 2d 1074 (1982).

cost information is consistent with viewing these offerings as private dealings rather than general, indiscriminate offerings.

18. Many special constructions are offered for less than one month. These activities are not stable, long-term offerings. But, unlike most common carrier offerings, they are not provided to many customers who repeatedly request the same service. Short-term special constructions do, however, involve facilities which are customer-tailored to meet an individual customer's needs and are technically and operationally distinct from those used to serve other customers. As in the case of multi-month special construction, when carriers note a short-term special construction in their tariffs, most do not file sufficient information for us or the public to discern whether the terms and conditions are just, reasonable, and nondiscriminatory. Nor do the carriers specify the range of circumstances under which they will offer the same terms and conditions as are agreed to in these private contracts. Nevertheless, because the affected parties agree to the terms for special construction, we have not had cause to find the terms of these offerings unreasonable.

19. Special service arrangements are usually stable, long-term, contractual offerings. Regardless of duration, most special service arrangements involve private agreements with individual customers for technically and operationally distinct services, typically involving technically and operationally distinct facilities. Similar services are not offered to many other customers.[36] Nor are special services offered with specifications as to the circumstances under which they will be available to other customers on the same terms and conditions. As in the case of special constructions, most carriers do not file special service arrangements with sufficient information to discern whether the terms and conditions are just, reasonable, and nondiscriminatory. Here, too, we have not had cause to investigate these tariffs because all affected parties accept the terms.

IV. *Proposal for Treatment of Special Construction of Lines and Special Service Arrangements*

20. We seek comments on the following six-part proposal for requiring special construction of lines and special service arrangements to be provided as non-common carrier offerings. First, we need to define the jurisdictionally-interstate activities to which this proposal would apply. We propose to treat as non-common carriage only extraordinary, customer-requested, individually-tailored construction and services, not offerings which are or should be general. We do not seek to expand the present rate

[36] Exchange Carrier Association Tariff FCC No. 1, Section 12.1 stated that the Telephone Company "may provide" a special service or arrangement. This discretion calls into question a carrier's commitment even to offer a special service to a particular customer, let alone the price at which the carrier would be willing to provide it.

of occurrence, range, or circumstances of special activities.[37] In particular, while we do not expect that this proposal will affect the availability of telephone service to customers,[38] we would be concerned if the comments show that universal service would be impaired. We would make any necessary adjustments in our proposal to ensure that telephone service continues to be widely available to residences and businesses. Special construction involves lines which are individually tailored, constructed, and priced in response to a customer's request where existing lines or ordinary tariffed facilities would not satisfy that request. Special-construction lines do not include lines made generally available by the carrier for its common carrier services. However, we are concerned that this definition relies in part on the availability of ordinary tariffed facilities (facilities made generally available) to determine whether special construction is necessary to respond to a customer's request. We seek comments on a possible standard for ordinary tariffed facilities.[39] Special service arrangements involve services which are individually tailored and priced in response to a customer's request where ordinary tariffed (generally offered) services would not satisfy that request. Special service arrangements are different from, and do not include, services made generally available by the carrier. We seek comments on a possible standard for ordinary tariffed services. While we may refine these tentative definitions in light of the record developed in this proceeding, we anticipate that cases will emerge where the carrier and/or customer are uncertain whether the offering is a common carrier service or special activity. The Commission's complaint process (47 U.S.C. § 208) or other proceedings would be available if a person believes that a carrier is providing special activities as common carrier services, or vice versa. For example, the Commission could require that a carrier unbundle an offering to separate special activities from common carrier services, or provide under tariff a service that is purportedly a special activity but

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[37] We do not believe that the provision of equal exchange access for Other Common Carriers should qualify as a special activity.

[38] We do not seek to preempt state regulatory bodies from determining that a franchised telephone exchange carrier that would supply a line (1) with at least one end in its franchised service area, and (2) to be used to provide some switched voice, intrastate services, should supply that line as a common carrier service. In rare circumstances, a franchised telephone exchange carrier presently may supply a line connected to its exchange for a remotely-located household or business through an individually-negotiated special construction arrangement. According to our proposal, as long as that line would be used for some intrastate switched-voice services, the state regulatory commission could choose to regulate that special construction as a common carrier service through tariff or otherwise. However, if state regulation of special activities appears to conflict with federal regulatory policies, we would consider whether federal preemption would serve the public interest.

[39] *See* note 1 *supra.*

which in fact should be offered on a common carrier basis (see para. 22 *infra*). Treatment of jurisdictionally-interstate special activities as not common carrier services is not intended to affect state regulation of special activities under the states' jurisdiction.

21. Second, we propose to grant all carriers Section 214 authorization for all special construction of lines and special service arrangements, to the extent that such authorization is necessary. This proposal covers such lines in all domestic areas, even in a telephone exchange common carrier's exchange service area. In the *Competitive Carrier Rulemaking, supra,* we eliminated the requirement of line-specific Section 214 applications for nondominant carriers to make it easier for them to provide facilities that meet consumers' needs and to reduce regulatory costs. Recently, we proposed to grant blanket Section 214 authorization for the provision of lines by a telephone common carrier for its cable television service or other non-common carrier services outside its telephone service area.[40] It appears that line-specific Section 214 authorization in cases of special construction and special service arrangements is unnecessary as a tool to control carriers' revenue requirements for common carrier services (see para. 23 *infra* on separate books of account and possible structural separation) or to promote other policy objectives. Section 214 applications involve costs and delays. Also, non-carriers do not require Section 214 authorization for providing lines. Requiring line-specific Section 214 authorization for carriers' lines used for special construction and special service arrangements may unnecessarily handicap carriers in competition with non-carriers. We tentatively conclude that all lines for special construction and special service arrangements promote the public convenience and necessity.

22. Third, we propose to disallow the filing in tariffs of new projects for special activities. Instead, pursuant to unbundling these services, carriers would file tariffs for the services related to these offerings which are generally-available, common carrier services. In addition, carriers would file publicly-available, semi-annual reports listing each of their special-activity projects with a brief description of the facilities and services provided. At the Commission's request, a carrier would have to file data on the customers, terms, conditions, costs, and charges for any or all of its special-activity projects. These steps will help the Commission discern discrimination and monitor the delineation of common carrier services versus special activities. One of the problems with the present treatment of special activities is that the descriptions in AT&T Tariff FCC Nos. 258 and 262 often are inadequate to determine whether, for example,

[40] Blanket Section 214 Authorization for Provision by a Telephone Common Carrier of Lines for its Cable Television and Other Non-Common Carrier Services Outside its Telephone Service Area, 49 Fed. Reg. 3213 (January 26, 1984).

a service noted therein should have been provided under AT&T's general private line tariff, AT&T Tariff FCC No. 260. A carrier's reports should make clear the distinction between a specific special offering and the carrier's tariffed common carrier services. As for specific special activities filed in currently-effective tariffs, we seek to avoid disruptions in expectations and agreements. Interested parties may file comments on whether some grandfathering provisions would be in the public interest.

23. The fourth part of this proposal is that carriers use books of account for their special activities which are separate from those used for their common carrier services. The costs on the separate books must at a minimum cover the direct, indirect and overhead expenditures incurred for special activities. The costs of preparing quotations for these special activities and the costs of installing and maintaining the special facilities also should be separated from the revenue requirements for common carrier services. In the *Second Computer Inquiry,* we required AT&T to provide customer-premises equipment (CPE) and enhanced services only through a fully-separated subsidiary (now called AT&T Information Systems). Recently we required the Bell Operating Companies (BOCs) to undertake some, but not full, structural separation for offering CPE, enhanced services, and cellular communications services.[41] It may be that structural separation should not be required for special activities provided by AT&T, the BOCs, or other common carriers. First, if the costs of special activities are small, the harm to subscribers from any cost shifting that may go undetected with separate books of account but that would have been prevented by structural separation would be limited (see paras. 2 and 3 *supra*). The larger costs of marketing CPE and enhanced services pose far greater dangers to subscribers from cost shifting. Second, our orders bar the separate subsidiaries of AT&T and the BOCs from owning transmission facilities. We would have to modify this prohibition if these subsidiaries were to provide special activities. While we are examining the limitations on AT&T's subsidiary in other proceedings,[42] it may be that the costs of spawning new subsidiaries or the possible ramifications of allowing the existing subsidiaries to own transmission facilities are not warranted by any benefits from structural separation for special services. Alternatively, we could require structural separation for special activities provided by AT&T and the BOCs. We seek comments on these alternatives.

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[41] Policy and Rules Concerning the Furnishing of Customer-Premises Equipment, Enhanced Services, and Cellular Communications Services by the Bell Operating Companies, Order FCC 83-552 (released December 30, 1983).

[42] Long-Run Regulation of AT&T's Basic Domestic Interstate Services, *supra;* and AT&T: Provision of Basic Service Via Resale by Separate Subsidiary, 49 Fed. Reg. 1248 (January 10, 1984).

24. Fifth, we propose to require each carrier to provide reasonable, nondiscriminatory interconnections for the special construction of lines and special service arrangements supplied by other carriers and non-carriers. As described in paras. 9-10 *supra,* we have established a policy favoring reasonable, nondiscriminatory customer-to-carrier and carrier-to-carrier interconnections, and we have entered specific orders requiring interconnections. We seek comments on whether further interconnection standards must be established by the Commission for special construction of lines and special service arrangements.

25. Finally, some special construction offerings may involve use of radio spectrum, *e.g.,* for microwave transmission lines or earth stations. If we decide to treat such construction as non-common carrier offerings, we propose to require that special construction utilize radio spectrum allocated to private, rather than common carrier, uses. Interested parties may comment regarding the effects on spectrum allocations of applying this proposal to future special construction, or to both existing and future special construction.

26. In conclusion, we here propose to change the treatment of special construction of lines and special service arrangements from common carrier to non-common carrier activities. The related facilities-authorization, unbundling, reporting, interconnection, and spectrum proposals are designed to increase competition, reduce cross-subsidies, promote just and reasonable rates for common carrier services, and limit discrimination.

V. *Regulatory Flexibility Act—Initial Analysis*

27. We conclude that the proposed change contained herein will have a positive economic impact on a substantial number of small entities, within the meaning of Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b) (1982). We are issuing this Notice of Proposed Rulemaking to receive public comment on our intention to change the regulatory treatment of special construction of lines and special service arrangements. Our objective is to compile a sufficient record to implement this proposal. The legal basis for this proposal is set forth in para. 27 *infra.* The proposed rule will apply equally to all common carriers and their affiliates—small business entities as well as large corporations—and should aid all carriers by eliminating regulatory costs and delay and increasing the ability of carriers to enter private contracts with customers.

VI. *Ordering Clauses*

28. This proceeding is instituted pursuant to the provisions contained in 47 U.S.C. §§ 154(i)-(j), 201-03, 211 and 403.

29. Comments must be filed on or before June 4, 1984. Reply comments will be due on or before June 25, 1984.

30. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

31. In accordance with the provisions of 47 C.F.R. § 1.419(b), an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D. C. 1919 M Street, N. W.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*